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No. _____

In the Supreme Court of the United States
October Term, 1999

JOHN G. STRAND, JOHN C. SHEA, and DAVID A. SVANDA, Commissioners of the Michigan Public Service Commission,

Petitioners,

v.

MICHIGAN BELL TELEPHONE, UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, and CLIMAX TELEPHONE CO,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal Telecommunications Act of 1996 (FTA) provides for approval or rejection by State commissions of interconnection agreements between telecommunications carriers. The only remedy prescribed in the FTA following such Commission action is District Court review to determine whether the agreement complies with the FTA. Are telecommunications carriers entitled to the more expansive remedies of an *Ex parte Young* action against individual State commissioners?

PARTIES TO THE PROCEEDING

Petitioners are John G. Strand, John C. Shea, and David A. Svanda, Commissioners of the Michigan Public Service Commission.

Respondents are Michigan Bell Telephone Company, d/b/a Ameritech Michigan, United States of America, Federal Communications Commission, and Climax Telephone Company.

Amicus curiae before the United States Court of Appeals for the Sixth Circuit were National Association of Regulatory Utility Commissioners, Public Utilities Commission of Ohio, Public Service Commission of Kentucky, Tennessee Regulatory Authority, Pennsylvania Public Utility Commission, and New York State Public Service Commission.

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The published January 18, 2000 opinion of the Court of Appeals for the Sixth Circuit is reported at 202 F.3d 862 (6th Cir., 2000) and is reprinted in the Appendix. App. to Pet. 1a – 11a. The unpublished Order of the Court of Appeals for the Sixth Circuit, denying rehearing and suggestion for rehearing *En Banc*, was filed on February 16, 2000 and is reprinted in Appendix. App. to Pet. 39a - 40a. The unpublished order of the Court of Appeals for the Sixth Circuit, denying a stay of mandate, was filed March 3, 2000. App. to Pet. 41a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 2000. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed and denied by order of the Court of Appeals, dated February 16, 2000. This Petition for Certiorari is being filed within 90 days of the February 16, 2000 order.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the Sixth Circuit below existed pursuant to 28 U.S.C. § 1291.

Since the Federal Communications Commission was a party below, Seth P. Waxman, Solicitor General, and Christopher J. Wright, General Counsel, Federal Communications Commission, are among the parties served, in accordance with Supreme Court Rule 29.4.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case concerns the interpretation and application of the following constitutional and statutory provisions, all of which are reproduced in the Appendix.

1. U.S. Const. art III, § 2. App. to Pet. 42a.
2. U.S. Const. amend. XI. App. to Pet. 43a.

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3. Telecommunications Act of 1996, as enacted, §§ 251, 252, 47 U.S.C. §§ 251, 252. App. to Pet. 44a - 61a.

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STATEMENT

Under the federal Telecommunications Act of 1996 (FTA), Pub. L. 104-104, 110 Stat. 56 [codified in scattered sections of Title 47 of the United States Code], Congress sought to open up the local telephone markets to competition. Congress recognized, however, that incumbent monopolist providers of local telephone service have strong economic incentives to delay and impede the introduction of competition in the local exchange market. To move toward a competitive model, Congress required incumbent local telephone providers to share their equipment and services with requesting telecommunications carriers. Included among the specific obligations imposed on the incumbents is the requirement that they negotiate in good faith with other telecommunications providers seeking "interconnection agreements." In the event the telecommunications providers are unable to negotiate interconnection agreements consistent with the FTA, either provider may file a petition for arbitration with the State public utility commission. 47 U.S.C. § 252(b).

On March 10, 1997, Climax Telephone Company filed a petition for arbitration with the Michigan Public Service Commission (MPSC) pursuant to 47 U.S.C. § 252(b)(1). After the incumbent telecommunications carrier, Michigan Bell Telephone Company, d/b/a Ameritech (Ameritech), filed its response, and following a hearing, an arbitration panel issued its decision on May 21, 1997.

On June 25, 1997, the MPSC (with one Commissioner dissenting) issued an order adopting the recommendations of the arbitration panel. App. to Pet. 18a - 33a. In that order, the MPSC directed the parties to file an executed copy of their interconnection agreement incorporating the MPSC's rulings. The parties filed the executed copy of the interconnection agreement. The MPSC (with one Commissioner dissenting) issued an order approving the interconnection agreement on August 13, 1997. App. to Pet. 34a – 38a.

Ameritech appealed the Order approving the Interconnection Agreement to the U. S. District Court for the Western District of

Michigan, by filing a complaint against Climax and John G. Strand, John C. Shea, and David A. Svanda, Commissioners of the Michigan Public Service Commission (MPSC Commissioners) in their official capacity. On November 7, 1997, Ameritech filed an amended complaint. In Count I, Ameritech sought a declaratory order finding that certain sections of the interconnection agreement violated the FTA, Federal Communications Commission (FCC) regulations, Michigan law and the Fifth and Fourteenth Amendments to the U. S. Constitution. Counts II and III asserted that the MPSC Commissioners exceeded their authority by requiring Ameritech to provide toll service.

The MPSC Commissioners moved to dismiss Ameritech's complaint. On February 12, 1998, the District Court issued a bench opinion finding that Section 252 of the FTA does not raise Tenth Amendment concerns because states may avoid federal review of state actions by not participating in the arbitration process. App. to Pet. 12a - 16a. The District Court further found that, under the FTA, State commission action is reviewable in federal court and nowhere else. App. to Pet. 14a. The Court then concluded that the State of Michigan had waived its Eleventh Amendment immunity from federal judicial review of its actions. App. to Pet. 14a. The District Court did not address the *Ex parte Young* issue.

The MPSC Commissioners appealed the District Court's decision to the U. S. Court of Appeals for the Sixth Circuit. On January 18, 2000, the Sixth Circuit affirmed the District Court's denial of the MPSC Commissioners' Motion to Dismiss. The primary basis for the Sixth Circuit's affirmance was its finding that "the case before this court is a straightforward *Ex parte Young* case. See *Ex parte Young*, 209 U.S. 123 (1908)." 203 F.3d at 867. App. to Pet. 7a – 9a.

REASONS FOR GRANTING THE PETITION

I. The individual Michigan Public Service Commissioners are immune from suit in federal court for alleged violations of the federal Telecommunications Act and a federal action against those state officers under *Ex parte Young* cannot be maintained since the federal Telecommunications Act's remedial scheme provides for only limited federal court review.

The Eleventh Amendment to the U. S. Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by the citizens or subjects of any foreign state.

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), explained this amendment as follows:

> Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Blatchford v Native Village of Noatak*, 501 US 775, 779 (1991). That presupposition, first observed over a century ago in *Hans v Louisiana*, 134 US 1 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that "'[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'"

517 U.S. at 54.

Justice Kennedy further explained in *Alden v. Maine*, 527 U.S. 706; 119 S. Ct. 2240 (1999):

> The Eleventh Amendment makes explicit reference to the States' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., Amdt. 11. We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.
>
> * * *
>
> The States thus retain "a residuary and inviolable sovereignty." The Federalist No. 39, at 245. They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority of sovereignty.

119 S. Ct. at 2246 – 2247.

Three recognized exceptions to this constitutional limitation on federal jurisdiction over a sovereign state are: (1) Congress may abrogate the states' Eleventh Amendment immunity; (2) a State may waive its Eleventh Amendment immunity and consent to be sued in federal court; and (3) under the doctrine established in *Ex parte Young*, 209 U.S. 123 (1908), individual state officers may be sued to

enjoin ongoing violations of federal law. As previously noted in the statement, the respondent Ameritech brought suit in federal court against the individual MPSC Commissioners pursuant to *Ex parte Young*. The MPSC Commissioners respectfully submit the federal courts lack jurisdiction to hear Ameritech's complaint.

In *Seminole Tribe, supra,* this Court held that an action against State of Florida officials under *Ex parte Young* was not available because the Indian Gaming Regulatory Act (IGRA) established a remedial scheme that was significantly narrower than what would be available in suits utilizing the *Ex parte Young* doctrine. 517 U.S. at 75-76. While Congress could authorize an *Ex parte Young* action in the context of a limited remedial scheme, this Court found that Congress did not intend that result when it enacted the IGRA. *See*, 517 U.S. at 75, n. 17.

The implications of *Seminole Tribe* may be viewed as being two-fold. First, Congress is capable of fashioning remedies for violations of the statutory rights it creates. Second, Congress is a superior legislator to the courts and its choice of remedy must be respected. *Wisconsin Bell v. Public Service Comm'n of Wisconsin,* 27 F. Supp. 2d 1149, 1159-1160 (Wisc., WD 1998).

Given the holding in *Seminole Tribe*, the question presented is whether Congress intended to authorize the more expansive *Ex parte Young*-type actions against individual State commissioners under the FTA. A review of the FTA establishes that Congress did not intend to subject individual State commissioners to *Ex parte Young* actions for alleged violations of the FTA.

In the FTA, Congress detailed the process to be used in the negotiation and arbitration of interconnection agreements. Specifically, Section 252 of the FTA establishes the procedure under which a requesting telecommunications carrier may negotiate interconnection agreements with the incumbent telecommunications carrier. If negotiations are unsuccessful, either party may file a petition for arbitration with the State commission[1] to arbitrate any unresolved issues.

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[1]Section 3(41) of the FTA, 47 U.S.C. § 153(41), defines a State commission as, "the commission, board, or official (by whatever name designated) which under the laws

At the conclusion of the arbitration process, the State commission must approve or reject the interconnection agreement. Either party may then file for district court review to determine if the interconnection agreement meets the requirements of §§ 251 and 252 of the FTA. This procedure is set forth in Section 252(e) as follows:

> PROCEDURES FOR NEGOTIATION, ARBITRATION, AND APPROVAL OF AGREEMENTS.
>
> (e) Approval by **State Commission**.—
>
> (1) Approval required.—Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the **State commission**. A **State commission** to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.
>
> * * *
>
> (6) REVIEW OF STATE COMMISSION ACTIONS.— . . . In any case in which a **State commission** makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section [252].

47 U.S.C. § 252(e). (emphasis added).

The language of the FTA indicates that Congress did not intend the federal court to provide *Ex parte Young* injunctive relief. For example, the review provision in Section 252(e)(6), by its own terms, provides for only a limited federal court review. Even then,

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of any State has regulatory jurisdiction with respect to intrastate operations of carriers."

Section 252(e)(6) authorizes the review of interconnection agreements and not the review of actions by the individual commissioners. Also, Section 252(e)(6) states that in any case in which a State commission has approved or rejected an interconnection agreement, the Federal district court's review is restricted to determining whether the interconnection agreement meets the requirements of Sections 251 and 252 of the FTA. 47 U.S.C. § 252(e)(6).

Federal courts interpreting Section 252(e)(6) have repeatedly rejected attempts by parties to obtain judicial review of State commission rulings during the arbitration process that did not involve or follow the approval of final agreements. As these courts have recognized, the FTA, which limits review to "a determination" pertaining to an "agreement or statement," does not provide federal courts with jurisdiction over claims that arise before a final agreement or statement has been approved. *See, e.g., GTE South, Inc. v. Morrison*, 957 F. Supp. 800 (E.D. Va. 1997) (federal court lacked jurisdiction over a challenge to the State commission's determinations regarding rate and nonrate issues in interconnection arbitration, absent an interconnection agreement); *GTE Northwest Inc. v. Hamilton*, 971 F. Supp. 1350 (D. Or. 1997) (federal court lacked jurisdiction over a challenge to the State commission's arbitration rulings, absent approval or rejection of an interconnection agreement). As these courts concluded, Congress did not envision that incumbent or competing carriers could rush to federal court and seek relief under Section 252(e)(6) at any step during the remedial process, but limited review in federal court to whether the interconnection agreements comply with the requirements of the FTA.

The FTA's scope of review[2] is in marked contrast to the scope of review available under *Ex parte Young*. In an *Ex parte Young*

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[2] The FTA provides different types of court review depending on the agency approving or rejecting the interconnection agreement. The first sentence of § 252(e)(6) provides for federal court review of FCC actions while the next sentence, applicable when a State commission approves or rejects an interconnection agreement, limits federal court review to a determination of whether the interconnection agreement meets the requirements of §§ 251 and 252. Section 252(e)(6) does not provide for review of State commission "actions."

action, the MPSC Commissioners would be exposed "to the full remedial powers of a federal court, including, presumably, contempt sanctions" *See, Seminole Tribe*, 517 U.S. at 75. However, an examination of the language of the FTA itself shows a different result. In *Seminole Tribe* this Court noted Congress' exclusive reference to "the state" in the IGRA and contrasted it to other statutes where Congress referred to individual state officers. 517 U.S. at 75, n.17. Similarly, in the FTA, Congress chose the words "State commission" in the judicial review provision. In fact, the words "state commission" appears no less than 46 times in Sections 251 and 252. Nowhere in Section 251 or 252 did Congress refer to individual state commissioners. Thus, the plain language of the FTA counsels against finding that an action pursuant to *Ex parte* Young can be brought against the individual MPSC commissioners.

In vesting State commissions with such authority, Congress has embarked upon a statutory scheme that is considerably different than what has generally existed. This was noted by this Court the first time it encountered the FTA in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), when it observed:

> . . . Congress has broadly extended its law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, interconnection agreements, etc) has left the policy implications to that extension to be determined by state commissions, which – within the broad range of lawful policymaking left open to administrative agencies – are beyond federal control. Such a scheme is decidedly novel, and the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel as well.

525 U.S. at 385, fn. 10. The fact that state commission action is authorized pursuant to a federal grant of authority to state commissions in § 252 and the fact that grant of authority is part of a "decidedly novel" statutory scheme enacted by Congress provides further justification that the FTA's remedial scheme that Congress devised in the FTA should be honored.

In all likelihood when Congress enacted the FTA it intended to abrogate the states' Eleventh Amendment immunity or extract constructive waivers from the states.[3] It is now clear, however, that the Congress has no such power.[4] But the fact that Congress has chosen an unconstitutional remedy in the FTA does not permit a federal court to redraft the statute to allow for an *Ex parte Young* remedy. As this Court noted in *Seminole Tribe*, the courts are not free "to rewrite the statutory scheme to approximate what we think Congress might have wanted had it known that [making the state suable in federal court] was beyond its authority." 517 U.S. at 76.

Additionally, if parties could sue individual State commissioners through the *Ex parte Young* doctrine and seek broader remedies than are otherwise available under Section 252(e)(6), why would they bother to sue under the FTA? Under *Ex parte Young*, parties could sue before, during, or after the approval or rejection of an interconnection agreement.[5] The references to "State commissions" would be inconsequential, and Section 252(e)(6) would be rendered meaningless. This is contrary to the basic rule of statutory

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[3] On February 8, 1996, when the FTA was signed into law, Congress was under the impression that the Commerce Clause could be used to abrogate the states' Eleventh Amendment immunity. See, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989).

[4] This Court overruled *Union Gas* on March 27, 1996 in *Seminole Tribe*. As a result, the Commerce Clause no longer provides Congress with the authority to abrogate the states' immunity. Additionally, on the last day of its 1998-1999 term, this Court decided *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), rejecting the constructive waiver doctrine. In doing so, this Court stated that the "constructive experiment of *Parden* was ill conceived" and overruled "whatever may remain" of the doctrine's seminal decision in *Parden v. Terminal Ry. Of Alabama State Docks Dep't*, 377 U.S. 184 (1964). 527 U.S. at ___; 119 S. Ct. at 2228.

[5] In fact, the Sixth Circuit in *GTE North v. Strand*, ___ F.3d ___; 2000 Fed. App. 0141P (6th Cir.) (April 20, 2000) (App. to Pet. 60a – 78a) recently found that the district court had general federal question jurisdiction under 28 U.S.C. § 1331 to hear a challenge of a MPSC order that did not involve the approval of an interconnection agreement. In the challenged order, issued in a state law proceeding unrelated to the pending arbitration of the interconnection agreement, the MPSC interpreted FTA Section 251(c)(3), as not precluding requests by GTE's competitors for access to pre-assembled, fully operational local service platforms as opposed to unbundled elements. The Sixth Circuit also stated, without explanation, that the *Ex parte Young* exception was applicable.

construction that the Court must interpret a statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole. *Food and Drug Admin. v. Brown & Williamston Tobacco Corp.*, ___ U.S. ___; 120 S. Ct. 1291 (2000).

Allowing this action to proceed against individual Commissioners when the FTA mentions only the State commissions would be directly contrary to this Court's admonition in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997), to not "adhere to an empty formalism and [] undermine the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings." In addition, granting Ameritech an *Ex parte* Young remedy could raise Tenth Amendment concerns as the federal court, on behalf of an individual, assumed supervisory authority over a State commission. In short, because Congress expressly provided for a specific, limited form of relief to enforce "State commission" compliance with the FTA, there is no basis to infer that Congress intended to subject the individual State commissioners to the full range of remedial powers of a federal court under *Ex Parte Young*. *See, Seminole Tribe*, 517 U.S. at 74.

II. The facts in this case do not support the application of the *Ex parte Young* doctrine.

A. The *Ex parte Young* doctrine cannot be used to compel a state official to perform discretionary acts.

This Court, in *Ex parte Young*, stated:

> There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case, the court can direct the defendant to perform this merely ministerial duty. *Board of Liquidation v. McComb*, 92 U.S. 531-541.

209 U.S. at 158. As the District Court in *Wisconsin Bell v. Public Service Comm'n of Wisconsin,* 57 F. Supp. 2d 710 (Wisc. WD, 1999), noted:

> At first glance, once must acknowledge the conceptual difference between a state official performing state functions in a way that violates federal law and a state official who is performing federally authorized functions but is alleged to have performed those functions improperly. One must acknowledge as well that some of the suits against State commissions brought under the act are directed at correcting the past decisions or other actions of the commission rather than at preventing future enforcement and that the actions at issue (interpretation and application of laws and regulations) involve the paradigmatic exercise of discretion.

57 F. Supp. 2d at 713.

The acts of the MPSC that Ameritech complains about undoubtedly involve the exercise of discretion. It cannot be reasonably contended that a decision involving the application of federal law, state law, and FCC regulation to complex telecommunications issues does not involve the exercise of discretion. There is a conceptual difference between the type of state action that is properly the subject of an *Ex parte Young* remedy and the type of action complained of in this case.

B. The State commission's past arbitration of an interconnection agreement as authorized by 47 U.S.C. § 252 cannot, for purposes of application of the *Ex parte Young* doctrine, be characterized as an ongoing violation of federal law.

This Court has stated:

> The doctrine of *Ex parte Young*, which ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law, is regarded as carving out a necessary exception to Eleventh Amendment immunity. * * * Moreover, **the exception is narrow; it applies only to prospective relief, does not permit judgments against state officers declaring that they had violated federal law in the past. * * * and has no application in suits against the States and their agencies, which are barred regardless of the relief sought. * * ***

Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (citations omitted; emphasis added).

In finding *Ex parte Young* applicable here, the Sixth Circuit failed to look beyond the request for injunctive relief. The Sixth Circuit found, "the PSC's ongoing enforcement of the interconnection agreement constitutes an ongoing violation of federal law." 202 F.3d at 867. Contrary to the Sixth Circuit's conclusion, there is no "ongoing enforcement." A number of considerations prompt this conclusion.

First, from a procedural standpoint, there is no ongoing case. The MPSC approval of the interconnection agreement at issue here was not "ongoing" when Ameritech filed its complaint. Moreover, should either Climax or Ameritech require the MPSC's assistance in enforcing the agreement, they must first file a complaint with the MPSC alleging a violation of the agreement. At that point, under state law, the MPSC may resolve whatever dispute exists between

Climax and Ameritech, Mich. Comp. Laws § 484.2204.[6] Therefore, the MPSC's authority to enforce the interconnection agreement arises under state law, and not the FTA.

Second, if a violation has occurred, it is a past violation that occurred during the arbitration and review process. Moreover, the arbitration and approval process that established Climax's interconnection agreement with Ameritech has been completed. The substantive relief sought by Ameritech is therefore retrospective, not prospective. Therefore, it is not the type of violation for which a remedy may be fashioned under *Ex parte Young*. As the District Court noted in *Wisconsin Bell, supra*:

> Although state commissions' activities are diverse, they all hinge on a written ruling. (Indeed, in all these four cases, defendant commission's written rulings are being challenged.) Congress made a logical choice when it decided to limit the remedy within the Telecommunications Act to having a commission's ruling tested in federal court. Such limited review is adequate to cure errors in federal law without subjecting state commissioners to the full remedial powers of a federal district court. Limited review keeps the number of litigants to a minimum, which conserves judicial resources. Under *Seminole*, 517 U.S. at 74, 116b S. Ct. 1114, because the remedy Congress chose secures federal rights adequately, this court lacks jurisdiction to proceed independently pursuant to *Ex parte Young*.

27 F. Supp. 3d at 1160.

In *Edelman v. Jordan*, 415 U.S. 651 (1974), this Court expressly confined the *Ex parte Young* doctrine to suits requesting

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[6] Mich. Comp. Laws § 484.2204 provides:

> If 2 or more telecommunication providers are unable to agree on a matter relating to a regulated telecommunication issue between the parties, including but not limited to, a matter prohibited by section 305, then either telecommunication provider may file with the commission an application for resolution of the matter.

prospective injunctive relief to prevent future violations of federal law. *Edelman*, 415 U.S. at 655. "Consequently, Young has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past. . . ." *Papasan v. Allain*, 478 U.S. 266, 277-78 (1986). Moreover, the focus of *Ex parte Young* is on future conduct of the state official, not on past conduct or conduct of an aggrieved party. See *Halderman*, 465 U.S. at 102-103; *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). Here, the MPSC arbitrated most of the provisions currently before the court for review. The interconnection agreement is at most a consequence of an alleged past wrong and is not a continuing wrong. Therefore, *Ex parte Young* is not applicable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

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Dated: May, 2000

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Michigan Bell Telephone Company,
d/b/a Ameritech Michigan,

Plaintiff-Appellee, No. 98-1315

v.

Climax Telephone Company,

Defendant,

John G. Strand, John C. Shea, and
David A. Svanda, Commissioners of
the Michigan Public Service
Commission (In Their Official
Capacities and not as Individuals),

Defendants-Appellants,

United States of America, Federal
Communications Commission,

Intervenors.

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 97-00197--Gordon J. Quist, District Judge.

Argued: April 29, 1999

Decided and Filed: January 18, 2000

Before: JONES, BOGGS, and COLE, Circuit Judges.

COUNSEL

ARGUED: David A. Voges, OFFICE OF THE ATTORNEY GENERAL, PUBLIC SERVICE DIVISION, Lansing, Michigan, for Appellants. John E. Muench, MAYER, BROWN & PLATT, Chicago, Illinois, for Appellee. Susan Pacholski, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D.C., for Intervenors. **ON BRIEF**: David A. Voges, David M. Gadaleto, OFFICE OF THE ATTORNEY GENERAL, PUBLIC SERVICE DIVISION, Lansing, Michigan, for Appellants. John E. Muench, Robert M. Dow, Jr., Theodore A. Livingston, MAYER, BROWN & PLATT, Chicago, Illinois, Jeffrey V. Stuckey, Joseph A. Fink, John M. Dempsey, Edward R. Becker, DICKINSON WRIGHT, Lansing, Michigan, for Appellee. Susan Pacholski, Mark B. Stern, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D.C., for Intervenors.

BOGGS, J., delivered the opinion of the court, in which JONES, J., joined. COLE, J. (p. 13), delivered a separate opinion concurring in part and dissenting in part.

AMENDED OPINION

BOGGS, Circuit Judge. Climax Telephone Company expanded its local exchange service into the service territory of Michigan Bell Telephone Company, d/b/a/ Ameritech Michigan ("Ameritech"). Climax petitioned the Michigan Public Service Commission (the "PSC") for arbitration of the terms, conditions, and prices for interconnection and related arrangements from Ameritech, under Section 252 of the federal Telecommunications Act of 1996 (the "FTA" or the "Act"), 47 U.S.C. § 252, and "the procedure adopted by the [PSC's] Order dated July 16, 1996, in Case No. U-11134." An arbitration panel rendered its decision, to which both parties objected. The PSC rejected the objections, adopted the arbitration panel's decision, and approved an interconnection

agreement between the parties based on the arbitration panel's decision.

Ameritech sued Climax and the Commissioners of the PSC in their official capacities, seeking declaratory and injunctive relief against enforcement of the interconnection agreement. The Commissioners moved to dismiss the complaint against them, citing provisions of the Act, the doctrine of sovereign immunity, and the Tenth and Eleventh Amendments. The district court denied the motion, and the Commissioners appeal its decision. We granted the Federal Communications Commission ("FCC") intervenor status, and now affirm the judgment of the district court. Only the interlocutory appeal is before us--the merits of the case have not yet been considered below.

I

Climax is an established local exchange carrier ("LEC") serving the Climax, Michigan area. On July 30, 1996, Climax filed an application with the PSC to provide local exchange service in the greater Battle Creek and Kalamazoo, Michigan area, where Ameritech is the incumbent provider. The application showed that Climax intended to establish a local calling area covering the geographical area served by four Ameritech local calling areas. In late 1996, Climax and Ameritech began negotiating an interconnection agreement and reached resolution on all but seven issues.

On March 10, 1997, just before the end of the statutory period for timely filing of petitions for arbitration, *see* 47 U.S.C. § 252(b)(1), Climax petitioned for arbitration. Pursuant to the procedures established in its opinion in case number U-11134, the PSC assigned the matter to an arbitration panel composed of two technical staff people and one administrative law judge. *See* Case No. U-11134, 1996 WL 467772 (Mich. P.S.C. July 16, 1996). The panel addressed the five open issues; on May 21, 1997, it adopted Climax's proposed resolution as to three issues, Ameritech's proposed resolution as to one issue, and found that the fifth issue was not properly raised.

On June 25, 1997, the PSC adopted the decision of the arbitration panel and ordered the parties to file the interconnection

agreement.[1] One commissioner dissented. On July 11, 1997, the parties filed the agreement. On July 25, 1997, Ameritech moved for a rehearing, which the PSC denied on August 13.

On September 12, 1997, Ameritech filed a complaint in federal district court against Climax and the PSC Commissioners in their official capacity. Ameritech seeks declaratory determinations that (1) certain sections of the agreement violate the Act, the implementing regulations, state law, and the United States Constitution, and (2) the PSC lacks jurisdiction to decide one of the issues. Ameritech also seeks to enjoin enforcement of those sections of the agreement, and to reform the agreement.

On November 24, 1997, the Commissioners moved to be dismissed as defendants, on grounds that (1) the district court lacked personal jurisdiction over them and (2) Ameritech failed to state a claim on which relief can be granted. The district court heard oral argument and denied the motion. The Commissioners appeal the denial of their motion to dismiss. This court ordered the Commissioners to show cause why the appeal should not be dismissed for lack of jurisdiction. *See* 6th Circuit Docket, Case No. 98-1315, March 25, 1998. On the Commissioners' further showing, the order was withdrawn on the ground that district court orders denying dismissal on Eleventh Amendment grounds are appealable collateral orders. *See* Order, Case No. 98-1315, April 16, 1998.

II

Where the district court bases its denial of a motion to dismiss for failure to state a claim purely on the legal sufficiency of the plaintiff's case, we review the decision *de novo*. *See Barrett v. Harrington*, 130 F.3d 246, 251 (6th Cir. 1997) (citing *RMI Titanium v. Westinghouse Electric Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996)). All factual allegations in the complaint are accepted as true.

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[1] The terms of the agreement are not important for purposes of the case now before us. The primary dispute in the case underlying the present appeal involves a term of the agreement that requires Ameritech to charge Climax local rates to terminate calls originating within Climax's large local area (but outside Ameritech's smaller local area), for which Ameritech would otherwise charge toll rates. Ameritech argues that this term is contrary to §§ 251 and 252 of the Act.

Nishiyama v. Dickson County, 814 F.2d 277, 279 (6th Cir. 1987) (*en banc*).

"Where a trial court's ruling on jurisdiction is based in part on the resolution of factual disputes, a reviewing court must accept the district court's factual findings unless they are clearly erroneous. However, review of the district court's application of the law to the facts is *de novo*." *RMI Titanium v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996) (internal citations removed) (citing *Ynclan v. Dep't of the Air Force*, 943 F.2d 1388, 1390 (5th Cir. 1991)).

Questions of statutory interpretation, like all matters of law, are reviewed *de novo*. *See United States v. Brown*, 915 F.2d 219, 223 (6th Cir. 1990).

A. The Telecommunications Act of 1996

Congress enacted the FTA to promote competition in all telecommunications markets, including the local service market. *See* H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124. Title I, Part II of the Act provides standards and procedures to allow startup carriers to interconnect their networks to the incumbent carrier's network, to access the incumbent carrier's network elements piece-by-piece, to purchase the incumbent carrier's retail services "at wholesale rates" for resale, and to access the incumbent carrier's physical infrastructure and facilities for connection purposes. 47 U.S.C. §§ 251(b)(4) and 251(c)(6). The Act contemplates that state public utility commissions will assume regulatory authority over interconnection agreements; if a state chooses not to do so "in any proceeding or other matter under this section," the FCC will assume regulatory authority "with respect to the proceeding or matter." 47 U.S.C. § 252(e)(5).

The Act requires incumbent providers to negotiate in good faith with new entrants; if the parties cannot resolve their differences, either party may petition the regulatory authority for arbitration of the unresolved issues. *See* 47 U.S.C. §§ 251(c), 252(b). The arbitration panel "shall limit its consideration of any petition [for arbitration] (and any response thereto) to the issues set forth in the petition and in the response, if any . . . ." 47 U.S.C. §

252(b)(4)(A). The arbitration panel must ensure that its resolution meets the requirements of § 251 and the FCC regulations implementing § 251, *see* 47 U.S.C. § 252(c)(1), and the regulatory authority may reject an arbitrated resolution *only if* it does not meet those requirements, *see* 47 U.S.C. § 252(e)(2)(B). When a state acts as the regulatory authority, "any party aggrieved by [its] determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section [252]." 47 U.S.C. § 252(e)(6). The Act expressly deprives state courts of jurisdiction to review the approval or rejection of an agreement by state regulatory authorities. *See* 47 U.S.C. § 252(e)(4).

B. Issues Presented on Appeal

The Commissioners raise four issues: (1) whether they are proper parties in a federal court action filed pursuant to 47 U.S.C. § 252(e); (2) whether the Eleventh Amendment bars naming the Commissioners in this suit; (3) whether the PSC, in arbitrating the agreement, waived sovereign immunity; and (4) whether the Tenth Amendment bars naming the Commissioners in this suit. Ameritech raises the issue of whether this court has jurisdiction to conduct interlocutory review of the Commissioners' "proper parties" and Tenth Amendment claims.

Ameritech and the FCC both cite numerous district court cases, twenty-three altogether, each of which denies the state regulatory agency's motion to dismiss. Recently, the Seventh Circuit became the first appellate court to consider the issue. *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir. 1999). The panel rejected the Commissioners' Eleventh Amendment argument and affirmed the district court's denial of their motion to dismiss.

C. Jurisdiction to Decide the Appeal

"Ordinarily, appellate jurisdiction is lacking to hear an appeal from an order denying a Rule 12(b)(6) motion to dismiss since such an order is interlocutory in nature." *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 225 (4th Cir. 1997); *see also Hill v. New York*, 45 F.3d 653, 659 (2d Cir. 1995) ("a denial of a motion to

dismiss is ordinarily considered non-final, and therefore not immediately appealable").

The Commissioners invoke the jurisdiction of this court pursuant to 28 U.S.C. § 1291 and the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949). "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. To be appealable as a collateral order, a district court's order must 1) conclusively decide the disputed issue; 2) resolve an important issue separate and independent from the merits of the action; and 3) be effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978). The Commissioners assert that their Tenth and Eleventh Amendment claims were conclusively determined by the district court, that they are completely separate from Ameritech's claim that the agreement is inconsistent with federal law, and that they would be effectively unreviewable on appeal from a final judgment. The Commissioners also argue that the Tenth Amendment claim is "inextricably intertwined" with their other claims, and assert jurisdiction under the doctrine of "pendent appellate jurisdiction." *See Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 797 (6th Cir. 1998).

Ameritech concedes that this court has jurisdiction to hear the Commissioners' Eleventh Amendment claim. *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-48 (1993); *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 5 F.3d 147, 149 (6th Cir. 1993). Ameritech argues that this court does not have jurisdiction to hear the claim that the Commissioners are not proper parties, nor the claim that the Act violates the Tenth Amendment. The district court's order is not a proper collateral order with respect to either claim, Ameritech contends, nor is either claim "inextricably intertwined" with the Eleventh Amendment claim to confer jurisdiction. *See Chambers*, 145 F.3d at 797 ("pendent appellate jurisdiction . . . only may be exercised when the appealable issue at hand cannot be resolved without addressing the nonappealable collateral issue"). Clearly, the Eleventh Amendment claim can be resolved without resolving either of the other claims.

All of the Commissioners' claims are separate and independent of the issue of whether the agreement is consistent with federal law, have been conclusively decided below, and would be effectively unreviewable on appeal from a final judgment. We must decide the Eleventh Amendment claim in any event, and it would be a waste of judicial resources not to hear the other claims now. Finally, all of the Commissioners' claims are unavailing.

D. Discussion

Although the Commissioners disagree, the case before this court is a straightforward *Ex parte Young* case. See *Ex parte Young*, 209 U.S. 123 (1908). Most district courts that have addressed this issue have applied the *Ex parte Young* doctrine and denied the state regulatory authorities' motions to dismiss.[2] We now do the same.

The *Ex parte Young* doctrine operates as an exception to the general rule of sovereign immunity that states may only be sued with their consent. Under *Ex parte Young*, suits against state officials seeking equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment. *Ex parte Young*, 209 U.S. at 159-60. The PSC not only approved the interconnection agreement, it is responsible for ongoing enforcement of the agreement. Ameritech alleges that the agreement violates federal law, and is

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[2] Similarly, the Seventh Circuit recently decided *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir. 1999), against the Illinois Commissioners. Although we agree with the result, we do not base our decision on the reasoning in that case because the court reached its decision by applying the constructive waiver doctrine, which has since been limited by the Supreme Court in *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999), and did not reach the *Ex parte Young* issue. *See MCI*, 168 F.3d at 320-23, amended 183 F.3d 558, 564-67. The Seventh Circuit has subsequently granted rehearing en banc on this opinion. 183 F.3d 567-68.

On March 29, 1999, the Middle District of Louisiana apparently became the first court to grant immunity to a state regulatory body. See *AT&T Communications of South Central States v. Bellsouth Telecommunications, Inc.*, 43 F. Supp. 2d 593 (M.D. La. 1999). The court considered itself bound by Fifth Circuit precedent interpreting *Seminole Tribe* as extinguishing waiver. See *id.* at 600-01 (citing *Chavez v. Arte Publico Press*, 157 F. 3d 282 (5th Cir. 1998)). *Accord Bell Atlantic-Md., Inc., v. MFS Intelenet of Md., Inc.*, Civil Case No. S 99-2061 (D. Md. Oct. 29, 1999).

BEST AVAILA

seeking equitable relief. Taking the alleged facts as true, as we are required to do when reviewing a dismissal for failure to state a claim, Ameritech has stated a claim against the Commissioners, and thus against the state of Ohio, for equitable relief from an ongoing violation of federal law. Under *Ex parte Young*, Ameritech is entitled to proceed.

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) and *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), do not affect the application of *Ex parte Young* to § 252 cases. Recently, the Supreme Court once again affirmed the vitality of *Ex parte Young*, even while strongly reaffirming states' rights against suit. See *Alden v. Maine*, ___ U.S. ___, 119 S. Ct. 2240, 2266-68 (1999) (sovereign immunity does not bar certain actions against state officers for injunctive or declaratory relief) (contrasting *Ex parte Young* with *Seminole Tribe* and *Coeur d'Alene Tribe*).

If Ameritech is correct in its claim that the agreement violates federal law, the PSC's ongoing enforcement of the interconnection agreement constitutes an ongoing violation of federal law, against which Ameritech seeks injunctive relief. Therefore, under *Ex parte Young*, the Eleventh Amendment does not bar Ameritech's suit against the Commissioners.

The Commissioners' Tenth Amendment argument is also unavailing. The Commissioners argue that the doctrine of *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 98 (1997), prohibits Ameritech's suit as a "commandeering" of state resources. Michigan chose to regulate interconnection agreements under the Act. It could have chosen not to participate, in which case it would not have arbitrated and reviewed the agreement between Ameritech and Climax. Michigan did, in fact, arbitrate and review the agreement, precisely the action complained of. The state cannot have it both ways. The United States did not compel its actions and, consequently, the Tenth Amendment does not bar Ameritech's suit. *See, e.g., New York*, 505 U.S. at 167, 179 (Congress may offer the states a choice of regulating activity); *FERC v. Mississippi*, 456 U.S. 742, 768 (1982).

Finally, the Commissioners argue that they are not proper parties under § 252(e)(6). They point out that § 252(e)(6) provides

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that "[i]n any case in which a State commission makes a determination . . . , any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of section 251 [and 252]," arguing that the other party to the agreement is the only proper parties for suit. This argument misses the point. The heading of subsection (e)(6) is "Review of State commission *actions*" (emphasis added). It is the PSC's duty, if it chooses to regulate, not the other party's, to ensure that the agreement meets the requirements of the Act both at the time of arbitration, 47 U.S.C. § 252(c), and at the time of approval, 47 U.S.C. § 252(e)(2)(B). Furthermore, it is the PSC's function, not the other party's, to enforce the agreement. Lacking power to enjoin the PSC from enforcing the approved agreement, federal courts would have little effective remedy for aggrieved plaintiffs, or would subject companies to the intolerable prospect of conflicting commands from federal courts and state regulatory agencies. The language quoted above limits the scope of a federal court's inquiry, but it does not limit the proper parties for suit.

III

On *de novo* review, the Commissioners' claims in this interlocutory appeal lack merit as a matter of law. The Eleventh Amendment does not bar Ameritech's suit because Ameritech is seeking injunctive relief against an ongoing violation of federal law. The Tenth Amendment does not bar the suit because the federal government did not commandeer state resources. Michigan chose to regulate interconnection agreements. Finally, the Act does not jurisdictionally bar the suit. Accordingly, the district court's denial of the Commissioners' motion to dismiss is AFFIRMED and the case is REMANDED for trial.

CONCURRING IN PART, DISSENTING IN PART

R. GUY COLE, JR., concurring in part and dissenting in part. I am in complete agreement with the majority's disposition of the Commissioners' Eleventh Amendment claim. I write separately because I do not believe that this court has jurisdiction to consider the interlocutory appeal of the Commissioners' other claims.

The Commissioners' Eleventh Amendment claim is clearly appealable under the collateral order exception. *See Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 5 F.3d 147, 149 (6th Cir. 1993). However, the Commissioners' Tenth Amendment and § 252 claims are not appealable collateral orders because those claims are not "effectively unreviewable on appeal from a final judgment." *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978). In addition, those claims do not fall under the doctrine of pendent appellate jurisdiction because they are not "inextricably intertwined" with the Eleventh Amendment claim, such that the Eleventh Amendment claim could not be determined without first addressing the nonappealable claims. *See Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 797 (6th Cir.), *cert. denied*, 119 S. Ct. 408 (1998).

Accordingly, I would affirm the district court's denial of the Commissioners' motion to dismiss based on the Eleventh Amendment, but dismiss the Commissioners' other claims for lack of jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN BELL TELEPHONE COMPANY
d/b/a Ameritech Michigan, Inc.,

Plaintiff,

vs. No. 5:97-CV-197

CLIMAX TELEPHONE COMPANY, et al.,
Defendant.

Before

THE HONORABLE GORDON J. QUIST,
U. S. District Judge
Grand Rapids, Michigan
February 12, 1998

APPEARANCES:

DICKINSON WRIGHT, PLLC
By: Joseph A. Fink
215 S. Washington Sq., Ste. 200
Lansing, MI 48933-1812
and
AMERITECH MICHIGAN, INC.
By: Michael Holmes
444 Michigan Avenue, Room 1750
Detroit, MI 48226
On behalf of the Plaintiff;

FRANK J. KELLY, ATTORNEY GENERAL
Public Services Division
By: Sharon L. Feldman
6545 Mercantile Way, Suite 15
Lansing, MI 48911
On behalf of the Defendant.

Grand Rapids, Michigan
February 12, 1998
2:45 p.m.

PROCEEDINGS

* * *

THE COURT: All right.

I came out here today, quite frankly, with my mind substantially made up, subject to change by whatever I heard here today. And I can't honestly say that I've read all of the cases cited by Mr. Fink addressing these same issues. I mean, after awhile, you start reading the same thing over and over. But I think I would -- I'm essentially persuaded at this stage of the proceedings that the majority of the -- well, the unanimity at the District Court level is the correct analysis of whether this particular court would have jurisdiction over commissioners of the Michigan Public Service Commission.

And although if I'd have been the first judge to look at some of these issues -- it's not particularly important what I have to say regarding them at this particular time, at least to do so in any particular detail, because all of the arguments have been made. And if it's up on appeal on some basis, they can be made again by plaintiff. And, perhaps, by that time, they'll have some decisions by the Court of Appeals somewhere which may have some more persuasive value with the Court of Appeals in the Sixth Circuit -- although, not necessarily.

And, therefore, rather than try to be creative here, let me just give you my decision in a rather conclusory fashion. You're going to have to bear with me. Let me assure you this will not be as articulate as if I had written it, but I do definitely have numerous notes and some cases in front of me.

I agree with the Ameritech that the Act gives the states a choice about whether or not to participate in the regulatory scheme. And if a state fails to act under Section 252, the federal commission assumes responsibility for the matter and preempts the state's jurisdiction. That's 47 U.S. Code Section 252(e)(5).

On the other hand, in my judgment, if a state chooses to participate, it does so with the knowledge that it may be subject to federal court jurisdiction. And that's Section 252(e)(6) of the Act.

As Ameritech points out, every federal court that addressed the issue has so held. And essentially the basis on which the district courts have so held is that the statute gives the states a choice of not participating, and Section 252 does not raise 10th Amendment concerns because states may avoid federal review of state actions by not participating.

And, therefore, the motion to dismiss on the basis of the 10th Amendment is denied.

Also, every court to consider the matter has determined that the 11th Amendment is not a bar to naming state public utility commissioners as defendants in a Section 252(e)(6) proceeding either on the basis of Ex parte Young -- Seminole Tribe definitely is not applicable here because it doesn't -- the statute does not require state participation and the commissioners' waiver of their 11th Amendment immunity in this particular case by conducting interconnection agreement arbitration.

And I tend to agree with Ameritech that Subsection (e)(6) informs the commissioners that if they do participate, they will be subject to suit in federal court.

And the one case that captured this quite well is U.S. West Communications, Inc. v. TCG Seattle, 971 F. Supp. 1365 (Western District of Washington, 1997).

> "The Telecommunications Act, on the other hand, expressly states that state commission action is reviewable in federal court and nowhere else. The implication that Congress conditioned state participation on the interconnection agreement process on waiver could hardly be clearer.
>
> "Accordingly, by participating in the interconnection agreement process, the State of Washington has waived its 11th Amendment immunity from federal

judicial review of its actions. The commissioners' motion to dismiss on 11th Amendment grounds is denied."

And the commissioners' motion in this particular case is also denied.

The commissioners also raise a ripeness argument. In my judgment, a ripeness argument is not a proper matter to determine in a motion to dismiss in this particular case. And I find that Ameritech's argument that Section 252(e)(6) dictates ripeness in this case is the more compelling argument.

The statute expressly provides the basis on which a party may seek review of a state commission's action. The review is limited to whether the agreement complies with federal law. While the issues in the other proceedings may incidentally touch on some of the issues before this Court, inquiry in this case is compliance with federal law, an issue not subject to review in the state proceedings.

Regarding the abstention arguments, first of all, as pointed out, subsection (e)(4) provides that state courts do not have jurisdiction to review actions of state commissioners in approving or rejecting an agreement, which makes federal court review the exclusive avenue for review in this case. That's subsection (6).

Second, Younger abstention is improper when a federal suit alleges claims within the exclusive jurisdiction of the federal court. State courts couldn't even look at the claims raised, at least on their face, by Ameritech in this particular case.

I think Pullman abstention would be improper because the case involves the issue of whether the agreement complies with the Act, not a constitutional question that can be avoided by the resolution of a state law question.

And Burford abstention is improper for the very reasons that Younger abstention would be improper.

And, therefore, the motion to dismiss on that basis is denied.

The argument regarding possible waivers, as well as the question of whether or not Ameritech's claim that it will suffer injury as a result of the commission's ruling, I think, is premature, speculative at this point in time. And in my judgment they involve issues of fact that are not proper for consideration under a Rule 12 motion. And taking Ms. Feldman's argument -- let's make it a Rule 56 -- I find that it would be improper to consider -- not consider, but to rule in the commission's favor – commissioners' favor under Rule 56 at this time. I think those kinds of questions -- waiver, injury -- are more properly determined after a record can be developed.

Therefore, the motion of the commissioners is denied in totality, and the case will proceed under the case management order.

* * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN BELL TELEPHONE COMPANY, d/b/a AMERITECH MICHIGAN,

Plaintiff

v.

CLIMAX TELEPHONE COMPANY, et al,

Defendants.

Case No. 5:97-CV-197
HON. GORDON J. QUIST

---/

ORDER

For the reasons stated on the record following oral argument on February 12, 1998,

IT IS HEREBY ORDERED that the Defendant Commissioners' Motion to Dismiss (docket no. 11) is DENIED.

Dated: February 13, 1998

GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the petition of CLIMAX TELEPHONE COMPANY, d/b/a CTS TELECOM, INC., for arbitration of interconnection rates, terms, conditions, and related arrangements with MICHIGAN BELL TELEPHONE COMPANY, d/b/a AMERITECH MICHIGAN.	)))))))	) Case No. U-11340

At the June 25, 1997 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. John C. Shea, Commissioner
Hon. David A. Svanda, Commissioner

ORDER ADOPTING ARBITRATION AGREEMENT

I.

HISTORY OF PROCEEDINGS

On March 10, 1997, Climax Telephone Company, d/b/a, CTS Telecom, Inc., (Climax) filed a petition for arbitration regarding the pricing, terms, and conditions for interconnection with Ameritech Michigan, pursuant to Section 252(b) of the federal Telecommunications Act of 1996 (the FTA), 47 USC 252(b). In accordance with the procedures adopted in the Commission's July 16, 1996 order in Case No. U-11134, Climax filed testimony, exhibits, and a proposed contract with its petition. On March 17, 1997, Administrative Law Judge James N. Rigas, Elizabeth Durbin, and Margaret Wallin were appointed to the arbitration panel. On April 4, 1997, Ameritech Michigan filed its response to Climax's petition, along with a double-redlined interconnection agreement containing agreed-upon contract terms and alternate proposed

language for disputed terms. Ameritech Michigan also filed testimony of four witnesses.

On April 11, 1997, at the direction of the arbitration panel, the parties submitted a joint status report, which set out in summary form the parties' respective positions on eight disputed issues. On April 25, 1997, the parties submitted proposed decisions of the arbitration panel. On May 1, 1997, the parties presented their respective positions before the arbitration panel.

On May 21, 1997, the arbitration panel issued its decision, noting that of the eight issues presented in the status report, only five remained in dispute.[3] For each of the disputed issues, the panel stated its decision, the rationale underlying that decision, and the language adopted as a result, if any.

On June 2, 1997, Ameritech Michigan and Climax filed objections to the decision of the arbitration panel. Those filings reflect that the parties have no objections to the arbitration panel's resolution of Issues 6 and 8. Those portions of the arbitration agreement to which the parties have not objected are properly and finally resolved for the reasons set forth in the arbitration panel's May 21, 1997 decision. The issues that continue in dispute are discussed below.

II.
DISCUSSION

Toll and Local Access Charges

Climax desires to offer local calling to a geographic area that encompasses more than one Ameritech Michigan local calling area. Because of the differing exchange boundaries, a dispute arises concerning the appropriate compensation to Ameritech Michigan when the call originates with a Climax Metro Exchange customer and terminates with an Ameritech Michigan customer located within the Metro Exchange area, but which call would be a toll call if it were between two Ameritech Michigan customers because it crosses

[3] The parties had notified the panel that they had resolved Issues 4, 5, and 7.

Ameritech Michigan's exchange boundaries that do not have extended area service (EAS).

Toll access charges are currently higher than local call termination charges. Climax has offered to pay 1.5¢ per minute for local call termination, the rate set in Case No. U-10640 and reaffirmed in Case No. U-10860 until the Commission could better examine cost evidence.[4] Toll access on the other hand is priced at 2.299¢ per minute.

The arbitration panel adopted Climax's position on this issue. It concluded that when a call (1) originates and terminates in the Metro Exchange, (2) is not routed over any Ameritech Michigan toll facilities or through Ameritech Michigan toll tandems, (3) is routed exclusively over facilities provided by Climax, and (4) is classified as local pursuant to Climax's tariffs, Climax should pay the local call termination rate.

Ameritech Michigan objects to the arbitration panel's determination and argues that the panel's conclusion has allowed Climax to unilaterally restructure the call compensation relationship between Climax and Ameritech Michigan, contrary to state and federal law and Commission orders.

Ameritech Michigan argues that the panel misinterpreted the Commission's October 7, 1996 order in Case No. U-11143, in which the Commission granted Climax's request to expand its basic local exchange license to include the geographic area served by Ameritech Michigan's Kalamazoo, Galesburg, Scotts, and Battle Creek exchanges. Contrary to the arbitration panel's conclusion, Ameritech Michigan argues, the Commission did not expressly approve the Metro Exchange boundaries as a local calling area for call compensation purposes. Thus, argues Ameritech Michigan, the Metro Exchange is not a local calling area as that term is defined in MCL 484.2102(p); MSA 22.1469(102)(p), which requires Commission approval. Moreover, Ameritech Michigan states, the Federal Communications Commission (FCC) in its order in In re

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[4] That rate may change when the Commission issues its final order in Case No. U-11280, in which the Commission is examining the long run incremental costs of various components of the network for purposes of interconnection.

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, released August 8, 1996 (FCC Order), interpreted the reciprocal compensation provisions of the FTA, 47 USC 251(b)(5), to leave to state commissions the responsibility to define local service areas "consistent with historical practice." FCC Order, ¶ 1035. Ameritech Michigan argues that the arbitration panel failed to adequately address how its decision complies with the FCC Order, even though that decision creates a local calling area that is not consistent with historical practice (i.e., Ameritech Michigan's current exchange boundaries).

Ameritech Michigan points out that the Commission has limited the scope of licensing proceedings to issues related to whether the applicant has met the statutory requirements for obtaining or enlarging a license. To that end, Ameritech Michigan asserts, the Commission has rejected other parties' attempts to intervene to raise additional issues. Ameritech Michigan argues that any attempt by it to intervene in Climax's licensing case to raise local calling area issues would have met with rejection.

Moreover, Ameritech Michigan argues, even if the Commission's order granting Climax an expanded license is read to approve the Climax Metro Exchange as a local calling area, such approval applies only to the relationship between Climax and its customers, not between Climax and Ameritech Michigan. It argues that the Commission did not need to resolve how Climax's proposed local calling area might affect the classification of local and toll calls placed by customers within the Metro Exchange in the licensing case. Ameritech Michigan asserts that the Commission order granting a license could not resolve an issue never placed before the Commission.

Ameritech Michigan further points to portions of the FCC Order and the FTA that suggest that Congress never intended to eliminate the FCC's existing access charge rules and requirements. In fact, Ameritech Michigan argues, Congress directed that until the FCC promulgates new regulations and establishes new rates for access, such access must be provided on the terms that applied before the effective date of the FTA. See, 47 USC 251(g) [Section 251(g)].

Additionally, Ameritech Michigan argues, the arbitration panel failed to explain why it believed that other competing providers could not declare even larger geographical areas, perhaps an entire LATA,[5] as a local calling area to avoid paying toll access rates. Ameritech Michigan submits that such a result would conflict with Section 251(g) and would alter the Commission's long-standing policy of mirroring interstate access charges for intrastate toll purposes.

Ameritech Michigan argues that the panel's decision does not promote competition as the panel apparently believed. Ameritech Michigan asserts that adopting its position would not prevent Climax from offering unique rate plans to its customers pursuant to which Climax would charge local or zone rates for calling any other party within the new, larger exchange. However, Ameritech Michigan argues, the tariffs Climax proposed in its licensing case reflect that Climax does not intend that its Metro Exchange customers be charged one flat, untimed rate for all calls within the exchange. Rather, Ameritech Michigan argues, those tariffs reflect an intent to use time and mileage sensitive rates that are more characteristic of toll service than of local service.

Ameritech Michigan goes on to argue that adopting Climax's position on this issue will not put competitors in a position of being able to compete equally in the local and long distance markets. It argues that adopting Climax's position will give it an advantage over other competitors because it will avoid paying terminating access rates by classifying calls that are billed as toll for all other local exchange companies (LECs) as local calls. Further, Ameritech Michigan argues, the reduction in access charges that is likely to result from proceedings now pending with the FCC will mitigate any disadvantage Climax claims will result from adopting Ameritech Michigan's position.

Finally, Ameritech Michigan points to decisions in Ohio and Wisconsin as persuasive authority for the Commission to continue to define local calling areas in accordance with those approved for the

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[5] LATA is an acronym for local access and transport area.

incumbent LEC, rather than allowing competitive LECs to redefine those areas for purposes of interconnection compensation.

The Commission finds that Ameritech Michigan's objections should be rejected. In the Commission's view, the question being addressed here is whether Ameritech Michigan's historic boundaries for local calling should dictate what constitutes a local calling area for all competing providers. The Commission finds that the public interest will best be served if that question is answered in the negative and the decision of the arbitration panel is affirmed. Further, the Commission finds the result reached by the arbitration panel is consistent with the FTA, the FCC Order, and other applicable law.

The FTA leaves to the state commissions the task of defining local calling areas. Pursuant to the statutory definition in MCL 484.2102(p); MSA 22.1469(102)(p), a local calling area "means a geographic area encompassing 1 or more local communities as described in maps, tariffs, or rate schedules filed with and approved by the commission." At the time that Climax received its license, the Commission approved its proposed Metro Exchange, within which the company seeks to provide basic local exchange service.

The Commission is not persuaded that the FCC Order dictates a different result. The cited paragraph reflects the FCC's acknowledgment that state commissions have historically determined the appropriate boundaries for local calling areas. It does not require that the Commission maintain those local exchange boundaries that the incumbent LECs proposed and the Commission approved prior to competition developing. Neither the FTA nor the FCC Order require that local calling area boundaries be the same for all providers within the state.

The Commission is also not persuaded that the limited scope of a licensing proceeding requires a different result than the arbitration panel reached. The statutory requirements for granting a license to provide basic local exchange service include a finding that a grant of the license is not contrary to the public interest. Thus, if the size or configuration of the geographic area proposed to be served as one exchange is contrary to the public interest, the

Commission may deny the application or require alteration of the proposed boundaries before granting the license.

As to Ameritech Michigan's argument concerning the tariffs that Climax submitted with its application, Climax represented in its oral presentation that it intends to offer local calling through out the proposed exchange and does not intend to use the tariff sheets it provided as an exhibit to its application.

The Commission finds that Climax's proposal to define a larger local calling area is consistent with the public interest and should be encouraged because it provides a new service configuration that may be competitive in price, terms, and other conditions of service. As long as Climax treats the Metro Exchange as a local calling area, and bills its customers for local calling, it should pay local termination charges rather than toll access charges when connecting its Metro Exchange customer to an Ameritech customer within the geographic boundaries of the exchange.

Finally, the Commission finds the decisions of the Ohio and Wisconsin commissions unpersuasive on this issue for lack of demonstration that the applicable state statutes and rules are the same as those in Michigan.

Traffic Measurement Method

The parties did not agree on the method to be used to measure local traffic for purposes of reciprocal compensation between the Climax Metro Exchange and the four Ameritech Michigan exchanges that cover the same geographic area. Climax proposed to use a periodic study method, while Ameritech Michigan proposed that the parties measure terminating calls by recording the actual minutes of use on an ongoing basis. The arbitration panel adopted Climax's position on this issue.

Ameritech Michigan objects to the arbitration panel's determination and asserts that both parties and the panel agree that the most accurate method to determine the traffic volumes between the Metro Exchange and Ameritech Michigan's exchanges is full measurement as proposed by Ameritech Michigan. Ameritech Michigan argues that full measurement is fully consistent with the

Commission's orders in Case No. U-10860, in which the Commission directed the parties to install capabilities that could fully measure and bill local traffic termination. It asserts that there is no reason to reach a different result here.

Ameritech Michigan charges that the panel erroneously relied on Ameritech Michigan's preliminary agreement to use the periodic study method on an interim basis for EAS traffic between the Climax Exchange and the neighboring Ameritech Michigan exchanges. Ameritech Michigan argues that, unlike the Climax Exchange EAS traffic, the Metro Exchange traffic is not well-established and stable and there is no history upon which to base estimates of traffic. Because usage with the Metro Exchange is expected to grow, Ameritech Michigan states that the traffic will be in a "state of constant flux, with the result that traffic flow pattern estimates taken one month will not reflect traffic patterns in even the next month, and certainly not in subsequent months." Ameritech Michigan's objections, p. 15. Therefore, Ameritech Michigan argues, a periodic study method is not proper for measuring the Metro Exchange local traffic and only a full, ongoing traffic measurement plan will be adequate. Ameritech Michigan further represents that all other competitive LECs have accepted and implemented the full measurement method for reciprocal compensation. In Ameritech Michigan's view, Climax should also be required to deploy full measurement.

Ameritech Michigan complains that the arbitration panel erroneously relied upon Climax's claim that it will furnish accurate, auditable billing records if allowed to combine Climax Exchange and Metro Exchange traffic on a single trunk group. Ameritech Michigan states that Climax uses Feature Group C trunks for intraLATA traffic, which do not make terminating access recordings available. According to Ameritech Michigan, that fact distinguishes this case from the arbitration proceedings involving Sprint Communications Company, L.P., (Sprint) and Ameritech Michigan in Case No. U-10203. Ameritech Michigan states that Sprint uses Feature Group D trunks, which have the ability to create records suitable for billing purposes.

Ameritech Michigan argues that Climax traffic studies cannot satisfy the requirement for accurate, auditable billing records

because the proposed traffic study method is neither accurate nor auditable in any meaningful sense. Ameritech Michigan explains that a study provides a snapshot of the traffic patterns and there is no method for verifying whether actual usage is accurately predicted by the study.

Moreover, Ameritech Michigan insists that the burden on Climax created by the need to implement actual measurement is not significant enough to support adoption of Climax's position on this issue. Ameritech Michigan charges that the panel erred when it found that requiring full measurement would impose additional, unnecessary costs on Climax. Ameritech Michigan points out that it agreed to bear the burden of full measurement of local Metro Exchange traffic terminated by Ameritech Michigan. It objects to what it views as a prohibition on measuring, at its own expense, local traffic terminated from the Metro Exchange merely because Climax is unwilling to do so for the local traffic terminated from Ameritech Michigan's exchanges.

The Commission concludes that, to best promote competition, the arbitration panel's decision should be affirmed. Although the periodic study method is not the most accurate method available for measuring traffic, it has been used successfully in EAS arrangements. The Commission has previously determined that EAS traffic is local calling. See, the Commission's June 5, 1997 order in Case No. U-10860.

Climax and Ameritech Michigan have already agreed to use a study methodology to measure local traffic in the Climax exchange. If Climax is required to use a different measurement method for the Metro Exchange, it will lose the efficiency otherwise available to it by combining trunk groups for local and toll traffic, a problem not resolved by Ameritech Michigan's offer to measure the traffic at its own expense. Ameritech Michigan has not persuaded the Commission that the Metro Exchange should be treated differently from the Climax exchange for purposes of measuring local traffic termination. The Commission notes that, like Sprint, Climax has committed to provide accurate, auditable records so that traffic may be identified and properly billed. Should Climax not be able to do as it has committed, it will be required to move to actual measurement immediately.

Climax objects to language in the arbitration panel's decision suggesting that Climax should be required to move to actual measurement for local termination if the Commission determines in Case No. U-11298 that it must use actual measurement for intraLATA toll traffic. Climax argues that a Commission determination concerning actual measurement of toll access does not resolve the problem of treating the Climax and Metro exchanges differently with respect to measuring local traffic. If actual measurement is not needed in the Climax Exchange for local (EAS) traffic, Climax argues, then it should not be required for local termination in an exchange in which Climax is in competition with Ameritech Michigan. Climax requests that the Commission clarify that its decision in Case No. U-11298 will not affect measurement of local traffic.

The Commission declines to grant Climax's request for clarification. One of the reasons for allowing Climax to use a study method of measurement is to allow it to combine traffic on existing trunks. If Climax must use actual measurement for intraLATA toll, it should likewise use actual measurement for local traffic termination.[6]

Ameritech Michigan objects to the arbitration panel's adoption of Climax's proposed language for Section 5.7.3. In Ameritech Michigan's view, Climax did not rebut Ameritech Michigan's prefiled testimony that Climax had not established why the risk of inability to identify which carrier initiated a toll call should be shifted to Ameritech Michigan when Climax will receive the benefit of terminating access charges in most instances. Ameritech Michigan requests that the Commission reverse this portion of the panel's decision.

The Commission finds that the decision of the arbitration panel should be affirmed. The language to which Ameritech Michigan objects is intended to require the party that accepts intra-

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[6] The Commission notes that the parties to Case No. U-11298 have reached a settlement agreement, which provides for use of new study methods for measuring traffic. That settlement does not require altering the arbitration panel's conclusion.

LATA toll traffic for delivery to the other party to bear the responsibility for failing to identify the originating carrier. Ameritech Michigan's objections are without merit. Climax cannot bill the originating carrier if it does not have the identification information that it requires. The delivering carrier is in a superior position to identify the originating carrier.

Combining Traffic on Trunk Groups

Ameritech Michigan objects to the arbitration panel's conclusion that Climax should be allowed to combine traffic from the Climax and Metro Exchanges on the same trunk groups. It acknowledges that the result of this issue is essentially dictated by the results of the issue concerning actual measurement, which is discussed earlier in this order. Ameritech Michigan asserts that the additional cost to Climax is small in that the company need provide only three additional trunk groups.

The Commission has already affirmed the result reached by the arbitration panel related to measurement and, accordingly, affirms the result the arbitration panel reached on this issue. There is no significant distinction between the combining of traffic on trunk groups in this instance and that decided in Case No. U-11203, in which the Commission found that Sprint should be allowed to combine traffic on the same trunk groups for efficient use of the installed network.

IntraLATA Toll Service

Ameritech Michigan objects to the arbitration panel's conclusion that the Commission should require Ameritech Michigan to provide intraLATA toll service to the Metro Exchange. Ameritech Michigan argues that the panel based its decision on its erroneous impression of certain contracts entered into between Ameritech Michigan and various customers for the provision of intraLATA toll service. Ameritech Michigan further argues that this issue was not raised in the petition for arbitration and is therefore not properly arbitrable, being barred by 47 USC 252 and the Commission's July 16, 1996 order in Case No. U-11134, which require that the petition for arbitration state all issues that are in dispute. Finally, Ameritech Michigan argues that adoption of the

panel's decision would require expanding the historical primary exchange carrier/secondary exchange carrier relationship into new geographic areas and might require the company to offer service at a loss.

Ameritech Michigan argues that the arbitration panel's decision rests on its belief that Ameritech Michigan merely seeks to put Climax at a competitive disadvantage by its refusal to provide intraLATA toll service to the Metro Exchange. Ameritech Michigan insists that the sole consideration for its decision not to provide intraLATA toll to the Metro Exchange is economics. It asserts that the costs of providing intraLATA toll service to the Metro Exchange may exceed what Ameritech Michigan currently charges residential customers for intraLATA toll service. Ameritech Michigan states that the access and terminating costs for an intraLATA toll call from the Metro Exchange to another Michigan Exchange Carriers Association (MECA) member company will total $0.13 per minute. Because Ameritech Michigan charges residential customers only $0.15 per minute for intraLATA toll calls, it projects that it would offer the service at a loss if required to do so. This, Ameritech Michigan argues, would amount to an unconstitutional taking of property without just compensation.

Moreover, Ameritech Michigan argues, when a competitive LEC ventures beyond its historic territory, it should not be allowed to take refuge in the primary exchange carrier system that was developed to protect small telephone companies that had neither the desire nor the capability to provide toll service.

Additionally, Ameritech Michigan argues, MCL 484.2306; MSA 22.1469(306) [Section 306], relied upon by the arbitration panel, does not require that Ameritech Michigan provide intraLATA toll service in the Metro Exchange. Ameritech Michigan states that Section 306 was not intended to address situations in which an incumbent LEC competes in other exchanges with another incumbent LEC. Ameritech Michigan argues that the Commission would violate the provisions of that section if it requires Ameritech Michigan to provide service at a cost above the price it charges.

Further, Ameritech Michigan argues, even if Section 306 could be found applicable to the present case, it would not require

Ameritech Michigan to provide the service. It asserts that other providers would be more logical candidates for providing intraLATA toll service. Because certain providers have committed to providing toll service throughout Michigan, Ameritech Michigan argues, refusing to require Ameritech Michigan to provide intraLATA toll service for the Metro Exchange will not leave Metro Exchange customers without a toll provider.

The Commission finds that the arbitration panel properly addressed and resolved this issue. Climax raised the issue in its petition for arbitration as a part of its argument concerning Ameritech Michigan's demand that Climax utilize separate trunk groups for the two exchanges. See Climax's petition, pp. 18-19. The additional arguments did not raise wholly new questions, but merely supported the position set out in Climax's petition.

The Commission further finds that Ameritech Michigan's objection to the arbitration panel's decision on this issue should be rejected. Ameritech Michigan provides intraLATA toll service in the geographic area of the Metro Exchange to its own customers, but desires to withhold that service from Metro Exchange customers. The arbitration panel determined that failure to require Ameritech Michigan to provide intraLATA toll service in the Metro Exchange would constitute a substantial road block for Climax's entry into the local exchange service market, in part based on contracts that Ameritech Michigan has negotiated with its own customers for the provision of intraLATA toll. If Ameritech Michigan is allowed to refuse to provide toll service in the Metro Exchange, customers located within the Metro Exchange area that signed long term contracts for intraLATA toll service with Ameritech Michigan are precluded from switching basic local exchange providers without incurring a penalty. Ameritech Michigan created a situation in which it would be inequitable to allow it to withhold intraLATA toll service from the competing Metro Exchange.

The Commission agrees with the arbitration panel that the present circumstances justify requiring Ameritech Michigan to provide intraLATA toll service pursuant to Sections 306, which grants the Commission authority to require interconnection between a toll provider and a basic local exchange provider that does not offer toll or have interconnection with a toll provider. In the present

case, Climax does not and will not provide intraLATA toll service, it is not interconnected with another provider for that service, and it has not received bona fide requests for 1+ dialing parity.

The Commission finds that Ameritech Michigan has not demonstrated that it cannot provide this service without incurring a loss. Although it complains that the access and termination charges are high for Climax and other MECA companies, it did not establish its own costs with regard to providing the service. Moreover, Ameritech Michigan is not without resources for altering the rates it charges customers for intraLATA toll service, or for seeking alterations in the access charges about which it complains. Therefore, the Commission finds Ameritech Michigan's constitutional arguments are without merit.

The Commission further finds that it would be contrary to the public interest and the anti-discrimination provisions of the Michigan Telecommunications Act, MCL 484.2101 et seq.; MSA 22.1469 (101) et seq., and the FTA to allow Ameritech Michigan to withhold intraLATA toll service to customers located within a geographic area in which Ameritech Michigan provides intra-LATA toll service to its own basic local exchange customers.

III.

CONCLUSION

The Commission finds that the objections raised by Ameritech Michigan and Climax to the decision of the arbitration panel should be rejected. Therefore, the Commission finds that the decision of the arbitration panel should be adopted for purposes of approving an interconnection agreement between Ameritech Michigan and Climax.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended by 1995 PA 216, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the

Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. The interconnection agreement, as adopted by the arbitration panel, should be approved.

THEREFORE, IT IS ORDERED that:

A. The interconnection agreement, as adopted by the arbitration panel, is approved.

B. A complete copy of the interconnection agreement, as adopted by the arbitration panel, shall be filed within ten days of the issuance of this order.

C. Ameritech Michigan shall interconnect with Climax Telephone Company to provide intra-LATA toll service to the Climax Metro Exchange.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

(SEAL)

/s/ John G. Strand
Chairman

/s/ John C. Shea
Commissioner, dissenting in a separate opinion.

By its action of June 25, 1997.

/s/ Dorothy Wideman
Its Executive Secretary

/s/ David A. Svanda
Commissioner

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the petition of CLIMAX TELE-PHONE COMPANY, d/b/a CTS TELECOM, conditions, and related arrangements with MICHIGAN BELL TELEPHONE COMPANY, d/b/a AMERITECH MICHIGAN.	)))))	Case No. U-11340

DISSENTING OPINION OF COMMISSIONER JOHN C. SHEA

(Submitted on June 25, 1997 concerning order issued on same date.)

I am not able to join in the approval of the accompanying order. As I have stated previously, see, November 1, 1996 Dissenting Opinion in Case No. U-11138, the means to reach the result embodied in the accompanying order cannot, as the majority states, arise under federal law. Rather, the Michigan Telecommunications Act, 1991 PA 179, as amended by 1995 PA 216, MCL 484.2101 et seq.; MSA 22.1469(101) et seq., (the "MTA") is the only authority that should control this proceeding.

Based on this reasoning, questions about this Commission's authority and jurisdiction have not been resolved for me. Accordingly, I dissent.

MICHIGAN PUBLIC SERVICE COMMISSION

_____

John C. Shea, Commissioner

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the petition of	)	
CLIMAX TELEPHONE COMPANY, d/b/a	)	
CTS TELECOM INC., for arbitration of	)	Case No. U-11340
of interconnection rates, terms, conditions,	)	
and related arrangements with MICHIGAN	)	
BELL TELEPHONE COMPANY, d/b/a	)	
AMERITECH MICHIGAN.	)	

At the August 13, 1997 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. John C. Shea, Commissioner
Hon. David A. Svanda, Commissioner

OPINION AND ORDER

On March 10, 1997, Climax Telephone Company, d/b/a CTS Telecom Inc., (Climax) filed a petition for arbitration regarding the prices, terms, and conditions for interconnection and related arrangements with Ameritech Michigan, pursuant to Section 252(b) of the federal Telecommunications Act of 1996, 47 USC 252(b). An arbitration panel was appointed and issued its decision on May 21, 1997. On June 25, 1997, the Commission issued an order, with Commissioner Shea dissenting, adopting the recommendations of the panel. The Commission required the parties to file within ten days an executed copy of an interconnection agreement that incorporated the Commission's rulings. On July 11, 1997, the parties filed an interconnection agreement and two ancillary agreements. On July 15, 1997, the parties filed a third ancillary agreement and a joint motion for approval of the full agreement. On July 25, 1997, Ameritech Michigan filed a petition for rehearing. On August 6, 1997, Climax filed an answer in opposition to the petition for rehearing.

Section 252 of the federal Telecommunications Act of 1996, 47 USC 252, requires that any interconnection agreement that is adopted by negotiation or arbitration be submitted to the Commission for approval. 47 USC 252(e) provides in part:

> (2) GROUNDS FOR REJECTION.--The State commission may only reject—
>
> (A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that--
>
> (i) the agreement (or any portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
>
> (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or
>
> (B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.
>
> (3) PRESERVATION OF AUTHORITY.- Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

47 USC 252(e)(2) and (3).

The Commission concludes that it should approve the interconnection agreement, with its attached schedules and

amendments. The Commission finds that the agreement is consistent with federal and state law, and is in the public interest.

In its request for rehearing, Ameritech Michigan argues that the settlement agreement in Case No. U-11298, which was approved by the Commission on June 25, 1997, requires all Michigan Exchange Carrier Association members, including Climax, to use actual measurement for intraLATA toll calls. Thus, Ameritech Michigan argues, Climax should be required to move to actual measurement for local call termination. Climax asserts that the settlement does not require actual measurement of terminating traffic. Therefore, Climax asserts, the Commission correctly found that there was no need to alter the findings of the arbitration panel based on the settlement in Case No. U-11298.

The Commission rejects Ameritech Michigan's argument. Although both of the measurement methods approved in Case No. U-11298 utilize some actual traffic measurement to derive the billable minutes of use, neither method requires continuous actual measurement by both parties and the mutual exchange of traffic information that actual measurement of local traffic termination would require. Therefore, the Commission concludes that it need not alter either the order or the arbitration panel's decision.

The remainder of Ameritech Michigan's petition for rehearing does not meet the standard of Rule 401 of the Commission's Rules of Practice and Procedure, 1992 AACS, R 460.17401. The petition merely reargues issues that the Commission considered and decided when it issued the June 25, 1997 order.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended by 1995 PA 216, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

BEST AVAILA

b. The interconnection agreement, with its attached schedules and amendments, should be approved.

c. The petition for rehearing should be denied.

THEREFORE, IT IS ORDERED that:

A. The interconnection agreement between Climax Telephone Company, d/b/a CTS Telecom Inc., and Ameritech Michigan is approved.

B. Ameritech Michigan's petition for rehearing is denied.

C. Approval of the agreement does not serve as precedent for Ameritech Michigan's obligations and does not alter its duty to comply with relevant federal and state law and past and future Commission orders.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

(SEAL)

/s/ John G. Strand
Chairman

/s/ John C. Shea
Commissioner, dissenting in a separate opinion

By its action of
August 13, 1997.

/s/ Dorothy Wideman
Its Executive Secretary

/s/ David A.Svanda
Commissioner

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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the petition of	)	
CLIMAX TELEPHONE COMPANY, d/b/a	)	
CTS TELECOM INC., for arbitration of	)	Case No. U-11340
of interconnection rates, terms, conditions,	)	
and related arrangements with MICHIGAN	)	
BELL TELEPHONE COMPANY, d/b/a	)	
AMERITECH MICHIGAN.	)	

DISSENTING OPINION OF COMMISSIONER JOHN C. SHEA

(Submitted on August 13, 1997 concerning order issued on same date.)

For the reasons stated in my dissenting opinion dated June 25, 1997 in this docket, I dissent.

MICHIGAN PUBLIC SERVICE COMMISSION

_____

John C. Shea, Commissioner

98-1315

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
FEB 16, 2000
LEONARD GREEN, Clerk

MICHIGAN BELL TELEPHONE COMPANY,
DOING BUSINESS AS AMERITECH
MICHIGAN,

Plaintiff-Appellee,

v. ORDER

CLIMAX TELEPHONE COMPANY,

Defendant,

JOHN G. STRAND, ET AL.,

Defendants-Appellants,

UNITED STATES OF AMERICA, FEDERAL
COMMUNICATIONS COMMISSION,

Intervenors.

BEFORE: JONES, BOGGS, and COLE, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly,

the petition is denied. The panel wishes to strike the word en banc from the last sentence of footnote 2, page 9, of the amended opinion filed January 18, 2000.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Case No: 98-1315

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
MAR 3 2000
LEONARD GREEN, Clerk

ORDER

MICHIGAN BELL TELEPHONE COMPANY, dba Ameritech Michigan, Inc.

Plaintiff - Appellee,

v.

CLIMAX TELEPHONE COMPANY; et al

Defendants,

JOHN G. STRAND; JOHN C. SHEA; AND DAVID A. SVANDA;

Defendants - Appellants,

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION

Intervenors.

BEFORE: JONES, BOGGS, and COLE, Circuit Judges

Upon consideration of the motion filed by the appellants to stay the mandate,

It is ORDERED that the motion be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

CONSTITUTION OF THE UNITED STATES
ARTICLE III--THE JUDICIARY

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

CONSTITUTION OF THE UNITED STATES
AMENDMENT XI--SUITS AGAINST STATES

Amendment XI. Suits Against States

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER II--COMMON CARRIERS
PART II--DEVELOPMENT OF COMPETITIVE MARKETS

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty

to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c)

of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall

be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that--

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (> 47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER II--COMMON CARRIERS
PART II--DEVELOPMENT OF COMPETITIVE MARKETS

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the

carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State

commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including

arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charges to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that–

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), and 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GTE North, Inc.,

Plaintiff-Appellant,

No. 98-1851

v.

John G. Strand, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Michigan at Lansing.
No. 98-00038--Robert Holmes Bell, District Judge.

Argued: December 13, 1999

Decided and Filed: April 20, 2000

Before: BOGGS and NORRIS, Circuit Judges; and FEIKENS, District Judge.*

COUNSEL

ARGUED: Patrick F. Philbin, KIRKLAND & ELLIS, Washington, D.C., for Appellant. David A. Voges, OFFICE OF THE ATTORNEY GENERAL, PUBLIC SERVICE DIVISION, Lansing, Michigan, for Appellees. Charles W. Scarborough, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL DIVISION, Washington, D.C., for Intervenors. **ON BRIEF:** Patrick F. Philbin, KIRKLAND & ELLIS, Washington, D.C., for Appellant. David A. Voges, Henry J. Boynton, OFFICE OF THE ATTORNEY

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* The Honorable John Feikens, United States District Judge for the Eastern District of Michigan, sitting by designation.

GENERAL, PUBLIC SERVICE DIVISION, Lansing, Michigan, for Appellees. Charles W. Scarborough,
UNITED STATES DEPARTMENT OF JUSTICE, CIVIL DIVISION, Washington, D.C., for Intervenors. Stephen F. Smith, David L. Lawson, Peter D. Keisler, SIDLEY & AUSTIN, Washington, D.C., for Amici Curiae.

OPINION

BOGGS, Circuit Judge. GTE North, Inc. (GTE), an incumbent local telecommunications carrier in Michigan, sued the defendants, members of the Michigan Public Service Commission (MPSC or the Commission), under the Federal Telecommunications Act of 1996 (FTA or the Act) after the Commission issued an opinion and order directing GTE to (1) publish tariffs in which GTE would offer to sell elements of its telecommunications network at rates predetermined by the Commission, and (2) allow competitors to purchase pre-assembled platforms of GTE network elements. In its complaint, GTE alleged that the MPSC's order conflicted with, and was preempted by, the FTA, and that enforcement of the order infringed GTE's statutory rights in violation of 42 U.S.C. § 1983.

GTE moved for summary judgment, and the defendants filed a cross-motion to dismiss for lack of subject matter jurisdiction. The district court granted the defendants' motion and dismissed the case without prejudice, holding that it did not have jurisdiction to review the MPSC's order under 42 U.S.C. § 252(e)(6), the FTA provision limiting federal judicial review of state commission orders approving or rejecting final interconnection agreements, because the challenged directive was merely an interlocutory order. See 42 U.S.C. § 252(e)(6) (1996). GTE timely appealed the district court's decision to this court.

Based on the language and legislative history of § 252(e)(6), we conclude that the limitations on federal review set forth in that provision do not apply in this case, and that the district court has general federal question jurisdiction under 28 U.S.C. § 1331 to hear GTE's challenge to the February order.

I

Before addressing the basis for the district court's jurisdiction over GTE's claims, it is necessary briefly to describe the administrative context in which the MPSC issued the challenged order. In the spring of 1996, AT&T and Sprint attempted to negotiate an interconnection agreement with GTE pursuant to § 251 of the FTA. Congress passed the Act in 1996 in an effort to promote competition in local telephone markets by ending regulated monopolies previously enjoyed by incumbent local exchange carriers (LECs) such as GTE. Before Congress enacted the FTA, state public utility commissions regulated local telecommunications markets by granting companies that incurred the expense of establishing local networks the exclusive right to provide service in the areas covered by their systems. In exchange for this privilege, LECs allowed the state commissions to regulate local service rates. The FTA altered this practice and addressed the underlying problem of anti-competitive local telecommunications markets in two ways: it preempted state commissions' authority to grant service monopolies, and obligated incumbent LECs to provide competitors with network access.

Although the FTA circumscribes state commissions' power to regulate local markets, it does not exclude state commissions from the FTA approval process. To the contrary, it invests them with authority to approve or reject interconnection agreements negotiated in accordance with the Act, which requires LECs to permit rival carriers to: (1) utilize the LEC's network and facilities; (2) purchase unbundled network elements from the LEC; and (3) purchase at wholesale rates any telecommunications service that the LEC provides at retail to subscribers who are not telecommunications carriers. *See* 47 U.S.C. §251(c)(2)-(4) (1996); *see also id.* § 252 (establishing procedures for negotiation, arbitration, and approval of interconnection agreements). To facilitate new competitors' entry into local markets, the FTA outlines specific procedures that LECs and new market entrants must follow in negotiating, arbitrating, and approving interconnection agreements. *See generally id.* §252 (1996). LECs and their competitors may negotiate interconnection agreements voluntarily, through mediation, or through compulsory arbitration before a state utility commission. *See id.* § 252(a)-(b) (1996). When a final agreement is reached, the telecommunications

or public utility commission for the state in which the LEC is located must approve or reject the agreement. *See id.* § 252(e) (1996).

Once a state commission rules on a proposed agreement, Section 252(e)(6), the FTA provision at issue in this case, authorizes any aggrieved party to "bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of section 251." *Id.* § 252(e)(6) (1996). If a state commission fails to approve or reject a proposed agreement within a certain time - 30 days from the date of submission if the agreement resulted from compulsory arbitration, or 90 days from the date submitted if the agreement resulted from voluntary negotiation or mediation - the Federal Communications Commission (FCC) may preempt the state commission's jurisdiction and rule on the validity of the agreement. *See id.* § 252(e)(4) - (5) (1996).

In this case, AT&T and Sprint petitioned the MPSC for compulsory arbitration under § 252 when the negotiations they began with GTE in 1996 did not produce an agreement. In March 1997, before a final agreement was reached, GTE filed a complaint in federal district court alleging that an order issued by the MPSC on January 15, 1997, concerning GTE's interconnection obligations to Sprint and AT&T violated the FTA. The district court dismissed GTE's complaint, holding that it did not have subject matter jurisdiction to review the challenged order because it was not an order approving or rejecting a final interconnection agreement. *See GTE North v. Strand*, No. 5:97-CV-20 (W.D. Mich. June 2, 1997) (citing 47 U.S.C. § 252(e)(6)).

Then, while arbitration proceedings between GTE, Sprint, and AT&T were still pending, the MPSC initiated unrelated state law proceedings against GTE and other incumbent LECs in order to establish terms of interconnection to Michigan local exchange networks generally. These proceedings concerned GTE as an LEC, but not specifically as a party to the AT&T and Sprint arbitration. In connection with these general interconnection proceedings, the MPSC required GTE and Ameritech, as Michigan LECs, to file with the Commission "Total Service Long Run Incremental Cost" (TSLRIC) studies for both regulated and non-regulated telecommunications services. In addition, the MPSC directed GTE to publish tariffs in which GTE would offer to sell its network elements

and wholesale services to any interested party at rates predetermined by the Commission. GTE responded to the Commission's order by filing a petition for rehearing in which GTE challenged the MPSC's rates for unbundled loops as confiscatory in violation of the FTA. The MPSC denied GTE's petition for rehearing, and GTE appealed the MPSC's order to the Michigan Court of Appeals. On December 30, 1997, the court affirmed the MPSC's order, and the MPSC proceeded to use GTE's and Ameritech's TSLRIC studies to determine prices for new entrants' access to bundled and unbundled network elements and basic local exchange services throughout Michigan.

On February 25, 1998, in the course of the state proceedings against GTE and Ameritech, the MPSC issued the order contested in this appeal. In the February 25 order, the MPSC used GTE's TSLRIC studies to establish the rates at which GTE would be compelled to sell unbundled network elements to its competitors. In addition, the order stated that the FTA requirement that GTE allow competitors to access pieces, or unbundled elements, of GTE's local network did not preclude GTE's competitors from requesting access to pre-assembled, fully operational local service platforms. Upon receiving the order, GTE sued the MPSC in the district court, alleging that the Commission, acting pursuant to Michigan law, violated the FTA when it issued the February 25 order: (1) directing GTE to provide competitors with access to pre-assembled, fully operational service platforms; and (2) requiring GTE to publish tariffs offering to sell elements of its network at rates predetermined by the Commission.

In its motion for summary judgment, GTE argued that the Commission's mandate directing GTE to provide competitors with access to pre-assembled network platforms violated § 251(c)(3) of the FTA because that provision requires LECs to provide competitors with access only to "*unbundled* network elements." 47 U.S.C. § 251(c)(3) (1996) (emphasis added). According to GTE, Congress deliberately limited incumbent LECs' obligation to grant competitors network access by requiring LECs to provide competitors only with "unbundled," or separated, network elements that the new carrier would have to assemble before it could provide service. *Ibid.* In addition, GTE argued that the portion of the February order directing it to offer pre-assembled platforms to all

potential competitors violated the FTA because the Act specifically states that only competitors who *request* unbundled access ("requesting carriers") are entitled to network access under § 251(c)(3), and then only after negotiating individual interconnection agreements. *See ibid.* GTE made a similar argument in challenging the MPSC's second directive, which, according to GTE, violates the FTA because it requires LECs to publish tariffs offering to sell network elements to *all* interested competitors at predetermined rates even though §§ 251 and 252 of the Act specifically require competitors to negotiate individual terms of access with LECs.[1] *See* 47 U.S.C. § 252(c)(2)-(3) (1996).

Although GTE's claims raise interesting questions about the scope and applicability of certain provisions of the FTA, the district court did not address these arguments on the merits because it determined that it lacked jurisdiction under § 252(e)(6) to review the MPSC's February 25 order. In its July 1998 ruling, the court dismissed GTE's claims for declaratory and injunctive relief on the basis that § 252(e)(6) precludes federal review where a state commission has not yet issued a final order approving or rejecting an interconnection agreement. GTE argues on appeal that the district court erred in dismissing the case for lack of subject matter jurisdiction because the district court had general jurisdiction under 28 U.S.C. § 1331 to hear GTE's claims. In deciding this appeal, we express no opinion on the merits of GTE's claims and determine only whether the district court has jurisdiction to entertain

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[1] Although GTE claims that it will be disadvantaged if its competitors are not required to negotiate individual terms of network access, any harm GTE may suffer on this score will arguably be temporary because universal subsidies are due to be phased out under the FTA. Cf. AT&T Corp. v. Iowa Utilities Bd., 119 S. Ct. 721, 737 (1999) (upholding an FCC rule that the plaintiffs said would "eviscerate the distinction between resale and unbundled access" and amount to "government-sanctioned arbitrage" on the grounds that the rule was consistent with the FTA, and noting that, because "§ 254 requires that universal service subsidies be phased out, . . . whatever possibility of arbitrage remains will be only temporary").

The counter-argument is, of course, that even if the tariffing requirement established in the February 25 order were struck down once the Commission approved an agreement incorporating the terms set forth in the tariffs, GTE could not recover damages for harm suffered in the interim, nor could it "turn back the clock and recreate the atmosphere of negotiations that would have prevailed if [its competitors] had not been operating for months under tariffing arrangements." Appellant's Br. at 24-25.

GTE's challenge to the February 25 order.

II

This court reviews de novo the district court's denial of GTE's motion for summary judgment. *See Greene v. Reeves*, 80 F.3d 1101, 1104 (6th Cir. 1996). We also review de novo the district court's decision to dismiss GTE's complaint for lack of subject matter jurisdiction. *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249, 252 (1986); *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996). Lack of subject matter jurisdiction is an affirmative defense that a defendant may assert in a motion to dismiss. See Fed. R. Civ. P. 12(b)(1); *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993) (emphasizing that to survive a motion to dismiss, a complaint must contain "either direct or indirect allegations respecting all material elements to sustain a recovery under some viable legal theory").

The party opposing dismissal has the burden of proving subject matter jurisdiction. *See Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990). Specifically, the non-moving party must show that the complaint "alleges a claim under federal law, and that the claim is 'substantial.'" *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996) (holding that a complaint is "substantial" unless "prior decisions inescapably render [it] frivolous"). That is to say, the non-moving party will survive the motion to dismiss by showing "any arguable basis in law" for the claims set forth in the complaint. Ibid. In conducting our review, we "construe the complaint in a light most favorable to the plaintiff, accept as true all of plaintiff's well-pleaded factual allegations, and determine whether the plaintiff can prove no set of facts supporting [his] claims that would entitle him to relief." *Ludwig v. Board of Trustees of Ferris State Univ.*, 123 F.3d 404, 408 (6th Cir. 1997). We review for clear error any factual findings the district court made in deciding the motion to dismiss. *See Gafford v. General Elec. Co.*, 997 F.2d 150, 161 (6th Cir. 1993).

Jurisdiction Over the Challenged Order

Based on the scope of the applicable statutory provisions and the nature of the challenged order, we conclude that the district court

has general jurisdiction pursuant to 28 U.S.C. § 1331 to hear GTE's claims. Section 252(e)(6), which prohibits federal review of interlocutory orders entered in the course of FTA proceedings, plainly does not preclude review of the February 25 order, which was entered in an independent state law proceeding unrelated to the AT&T-Sprint arbitration. Moreover, even if one could interpret § 252(e)(6) to encompass GTE's claims, to do so would frustrate Congress's intent by allowing state commissions to insulate from federal review decisions allegedly preempted by, or otherwise contrary to, federal telecommunications law. We therefore reverse the district court's order dismissing GTE's complaint, but express no opinion on whether the order directing GTE to sell pre-assembled platforms and other network elements at predetermined rates is preempted by the FTA.[2] We similarly express no opinion on whether the portion of the February 25 order directing GTE to sell network elements to any interested competitor at rates predetermined by the Commission is preempted by the FTA requirement that competitors obtain access to local networks by negotiating individual interconnection agreements.[3]

To survive a motion to dismiss based on lack of federal question jurisdiction, the non-moving party must show first that its claims arise under federal law and, second, that § 1331 jurisdiction is not "preempted by a more specific statutory provision conferring exclusive jurisdiction elsewhere." *Connors v. Amax Coal Co.*, 858 F.2d 1226, 1229-30 (7th Cir. 1988). GTE asserts that the district court has subject matter jurisdiction over its 42 U.S.C. § 1983 and federal preemption claims because: (1) such claims arise under the Constitution and laws of the United States; and (2) the MPSC's February 25 order, which the parties agree was issued pursuant to Michigan law, deprives GTE of its rights under the FTA, thereby

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[2] Section 261 of the FTA provides that state commissions can impose their own rules "in fulfilling requirements of this part, if such regulations are not inconsistent with the provisions of [the FTA]." 47 U.S.C. § 261 (1996). State commissions may also impose additional requirements on LECs if such requirements "are necessary to further competition in the provision of telephone exchange access, so long as the State's requirements are not inconsistent with the [Federal Communication] Commission's regulations to implement this part." *Id.* § 261 (b)-(c).

[3] *See* 47 U.S.C. §§ 251(a)(1), 251(c)(1) (requiring incumbents and their competitors to negotiate in good faith the specific terms and conditions of interconnection agreements).

creating a cause of action for prospective injunctive relief against the commissioners under 42 U.S.C. § 1983 and *Ex parte Young*, 209 U.S. 123 (1908). We agree.

Because GTE's claims arise under federal law, the district court has jurisdiction under § 1331 to decide the case unless GTE's claims are subject to the limitations on federal review set forth in § 252(e)(6), which we conclude they are not. See 47 U.S.C. § 252(e)(6) (1996); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (holding that a plaintiff who "seeks injunctive relief from a state [or local] regulation on the ground that such regulation is preempted by federal law . . . presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve"). Federal question jurisdiction over GTE's claims is not preempted by the FTA because § 252(e)(6) only circumscribes federal judicial review of interlocutory orders issued in FTA, not state law, proceedings. *See Connors*, 858 F.2d at 1229-30.

The text and legislative history of the FTA make clear that § 252(e)(6) is the exclusive basis for federal judicial review only of orders entered in negotiation or arbitration proceedings under § 252 of the Act. Section 252(e)(6) provides that, "[i]n any case in which a State commission makes a determination *under this section*, any party aggrieved by such determination may bring an action in an appropriate federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6) (1996) (emphasis added). Because the MPSC initiated the state law proceedings that resulted in the challenged order independent of the procedures prescribed in the FTA, § 252(e)(6) does not limit federal judicial review of the February 25 order, and the MPSC's failure, thus far, to incorporate the terms of the order in a final decision approving or rejecting an interconnection agreement does not bar review of GTE's claims.

In holding that GTE's suit was premature because the MPSC had yet to issue a final order reviewable under § 252(e)(6), the district court relied heavily on its prior decision in *GTE North v. Strand*, No. 5:97CV01, 1997 WL 811422 (W.D. Mich.),[4] and in so

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[4] In *Strand*, the district court noted that an MPSC order is a "determination" subject to federal review under section 252(e)(6) only if the order approves or rejects a final

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doing failed to recognize the legal significance of the February 25 order's state law origins. As the district court implicitly acknowledged in *Michigan Bell Telephone Co. v. MFS Intelenet of Michigan, Inc.*, 16 F. Supp. 2d 817, 823 (W.D. Mich. 1998), *Strand* stands for the limited proposition that federal district courts have "no jurisdiction to review MPSC decisions arising *during* the § 252 *process* until after [an] interconnection agreement ha[s] become final by way of commission approval or rejection." *Ibid.* (citing cases) (emphasis added). The court in *MFS* thus distinguished *Strand* and upheld jurisdiction over the plaintiff's challenge to an MPSC order interpreting (rather than approving or rejecting) an existing interconnection agreement. See id. at 823-24; *cf. Michigan Bell Telephone v. Strand*, 26 F. Supp. 2d 993, 999 (W.D. Mich. 1998) (emphasizing the "Congressionally assigned role of the district courts in preventing violations of the Telecommunications Act flowing from enforcement decisions or other decisions inconsistent with existing interconnection agreements"). In this case, as in *MFS*, the challenged order did not arise "during the § 252 process," and is therefore not subject to the reasoning in Strand or the many other cases cited by the lower court in which district judges have refused to review interlocutory orders issued by state commissions in the course of § 252 arbitrations. Id. at 823.

Although the order at issue in this case is clearly distinguishable from an interlocutory order entered in a § 252 proceeding, the commissioners urge us to overlook the order's state law origins because the order establishes rates that the parties agree will likely be incorporated in a final agreement subject to review under § 252(e)(6). Were we to adopt this approach, we would simply equate the February 25 order with an interlocutory order in a § 252 proceeding that GTE could not challenge in federal court until the Commission issued a final decision approving or rejecting an agreement incorporating the terms of the order. Recharacterizing the February 25 order in this manner appears consistent with the FTA if one reads § 252(e)(6) broadly to govern not only claims that a state utility commission erred in approving a final agreement negotiated under § 252, but also claims that the commission violated the FTA by approving an agreement that was not the product of a § 252 proceeding. Although this construction of § 252(e)(6) is superficially

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interconnection agreement. *See Strand*, 1997 WL 811422, at *2 (quoting *GTE South v. Morrison*, 957 F. Supp. 800, 804 (E.D. Va. 1997)).

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appealing, we cannot adopt this approach and assume that GTE would eventually be able to seek federal review of the challenged order because any approach that equates a decision arising out of independent state law proceedings with an interlocutory order in a § 252 arbitration ignores the critical fact that the former may be enforced against the parties even if it is never incorporated in a final interconnection agreement.

At first blush, § 252(e)(6) seems to guarantee adequate, albeit deferred, judicial review of the Commission's February 25 order. *See, e.g., Thunder Basin Coal v. Reich*, 510 U.S. 200 (1994) (holding that a statutory provision that places temporal restrictions on a party's ability to bring an action in federal court still provides adequate opportunity for review and therefore satisfies due process). As the district court noted in its opinion, the parties agree that the rates established in the Commission's February 25 order will likely be incorporated into a final arbitration agreement. Standing alone, this admission appears to undercut GTE's argument that the district court has jurisdiction over its claims under § 1331. Indeed, when combined with the Commission's assertion that it has been prevented from ruling on an agreement incorporating the challenged terms because GTE has not made certain filings, the parties' admission virtually guarantees that, if GTE were to execute an agreement, either the MPSC or the FCC would approve or reject the terms of the challenged order, at which point GTE could seek federal review under § 252(e)(6). *See* 47 U.S.C. § 252(e)(1) (1996) (stating that a state commission "shall" approve or reject "any" interconnection agreement between an incumbent and a requesting carrier, whether the agreement is the product of voluntary negotiation or binding arbitration before the state commission). The problem with this logic, and the reason § 252(e)(6) does not provide for adequate review of the challenged order under *Califano v. Sanders*, 430 U.S. 99, 108 (1977), or even under *Thunder Basin*, 510 U.S. 200 (1994), is that an interested buyer could enforce the tariffs established in the February order in the Michigan courts without ever executing a final interconnection agreement with GTE.

In determining whether the lower court has jurisdiction over GTE's claims despite the limitations in § 252(e)(6), this court must look "not only [to] the particular statutory language, but to the design of the [FTA] as a whole and to its object and policy." *Crandon v.*

United States, 494 U.S. 152, 158 (1990). Citing the Supreme Court's decision in *Califano*, the district court correctly observed that, "[w]here Congress has provided an adequate procedure to obtain review of an agency determination, alternative bases for jurisdiction are inapplicable." *Califano*, 430 U.S. at 108. The district court noted in its opinion that confining federal review of GTE's claims to the circumstances outlined in § 252(e)(6) might theoretically deprive GTE of "adequate" review under *Califano* because such review would be contingent upon the MPSC's approval of a final agreement incorporating the February 25 order. However, the court found that the probability that the order would be incorporated into a final agreement was so strong as to eliminate the contingency and virtually guarantee judicial review.

We disagree, and find that in this case § 252(e)(6) cannot be relied upon to provide adequate federal review because there is a chance, regardless how small, that GTE's competitors may obtain service from GTE on the terms set forth in the February 25 order *without ever executing* a final agreement. Indeed, we think the appropriate inquiry is not whether, in the court's estimation, it is more likely than not that the challenged order will be incorporated into a reviewable agreement, but whether there is any possibility at all that an LEC's competitors could enforce the terms of the challenged order by means other than those prescribed in the FTA. If there is such a chance, § 252(e)(6) does not provide the party challenging the order with adequate review under *Califano*, and the federal district courts have general jurisdiction to review the order under 28 U.S.C. § 1331.

Under Michigan law, a buyer interested in purchasing network elements from GTE at the rates established in the February order need not execute a final interconnection agreement with GTE to enforce the tariff; it need only petition a state court for an injunction enforcing the terms of the tariff against GTE. *See, e.g., Rinaldo's Construction Corp. v. Michigan Bell Telephone Co.*, 559 N.W.2d 647, 653-54 (Mich. 1997). In *Rinaldo's*, the Michigan Supreme Court held:

> [W]here a plaintiff seeks relief against a telephone company in a [state] court of general jurisdiction, under *Valentine [v. Michigan Bell*, 199

> N.W.2d 182 (Mich. 1972)], the court may entertain (1) a cause of action in tort, or (2) *a claim that the telephone company has violated the regulatory code or tariffs*.

Id. at 653-54 (emphasis added). As the Michigan Supreme Court went on to explain, "[c]auses of action in tort and those causes of action alleging that a telephone company has violated the tariffs or code are not cases in which the rationale underlying the doctrine of primary jurisdiction [requires the state courts to defer to the MPSC]." *Id.* at 654. Because an interested buyer need not incorporate the terms of the February 25 order into a final arbitration agreement to enforce GTE's obligations under the order, § 252(e)(6) does not provide an "adequate procedure" by which GTE may obtain review of the MPSC's directives. That GTE could contest the validity of the February 25 order in the course of defending a state court enforcement proceeding does not solve the problem, because leaving resolution of GTE's claims to the state courts would clearly frustrate Congress's goals under the FTA. *See, e.g., MFS Intelenet*, 16 F. Supp. 2d. at 823-34 (concluding that review of § 252 "as a whole" demonstrates that "Congress has created a unique framework which, while inviting state commissions to arbitrate and approve interconnection agreements, retains exclusive jurisdiction within the federal courts to ensure that those agreements meet federal requirements").

The district court has subject matter jurisdiction under § 1331 to review federal preemption claims. *See Bibbo v. Dean Witter Reynolds, Inc.*, 151 F.3d 559 (6th Cir. 1998). The question in this case is simply whether § 252(e)(6) divests the district court of its jurisdiction over GTE's preemption claims because the February 25 order, though itself a product of state law proceedings, establishes rates that might one day be incorporated into final arbitration agreements approved by the MPSC. There is no evidence that Congress intended § 252(e)(6), which grants federal courts exclusive jurisdiction to review for FTA compliance state commission orders approving or rejecting interconnection agreements, to preclude federal review of state law orders that permit telecommunications carriers to circumvent the procedures prescribed in the FTA for negotiating network access. We recognize, of course, that the significance of the challenged order's state law origins has

engendered legitimate debate among the parties and in the district court. However, absent clear evidence that Congress intended to allow state commissions to issue orders that may be enforced without being incorporated into final interconnection agreements, we will not construe § 252(e)(6) to preclude federal review of preemption challenges to state commission orders issued in non-FTA proceedings.

Indeed, to hold to the contrary would have enormous negative implications: if only certain actions (final orders approving interconnection agreements) by state commissions are reviewable in federal court, and if, as the district court held, § 252(e)(6) is the exclusive basis for judicial review of state commission actions that in any way relate to interconnection agreements, state commissions may insulate regulatory requirements that violate the FTA from federal, and possibly even state, court review. This interpretation of § 252(e)(6) conflicts with Congress's decision to establish federal procedures for negotiating interconnection rights and to concentrate judicial review of interconnection agreements in the federal courts. It is also antithetical to the principle that parties injured by a governmental entity's failure to adhere to the law may seek redress in the courts. Finally, denying review and forcing GTE either to violate the February 25 order, or to comply with the general and immediate obligations imposed by the order in the hope that the order would one day be incorporated into a reviewable final agreement, would undermine both the letter and spirit of the FTA.

Section 252(e)(6) circumscribes federal review only of cases born of § 252 proceedings. Because the MPSC's February 25 order was not the product of § 252 arbitration, but of an independent state law proceeding, § 252(e)(6) does not preclude jurisdiction over GTE's claims. We therefore hold that federal review is available under § 1331 to determine whether state commission orders violate federal law except in cases in which the challenged regulatory action is clearly an interlocutory order arising out of § 252 proceedings. We confine our holding to the jurisdictional question because it is for the district court to determine on remand whether the directives in the February 25 order violate § 252 of the FTA as recently interpreted

by the Supreme Court in *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999).[5]

III

The MPSC argues that, even if we have jurisdiction over GTE's claims, it would be prudent for us to abstain from ruling on the merits of the case until the rates specified in the February 25 order are incorporated into an interconnection agreement approved by the Commission. We decline to express an opinion on the merits of GTE's claims, but not on the grounds urged by the defendants. Although the Michigan courts have concurrent jurisdiction over GTE's § 1983 and preemption claims, we should decline to decide this case only if the requirements for abstention established in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), *Younger v. Harris*, 401 U.S. 37 (1971), or *Railroad Comm'n of Texas v. Pullman Co.*, 312

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[5] In *Iowa*, the Supreme Court reversed the Eighth Circuit's decision vacating, as inconsistent with the private negotiation provisions of the FTA, the FCC's "pick-and-choose" rule, which required incumbents to offer network access to any potential competitor on the same terms enjoyed by earlier competitors who negotiated individual agreements with the incumbent. The Eighth Circuit vacated the rule on the basis that it allowed late market entrants to obtain the benefits of previous competitors' agreements without having to accept the trade-offs that the initial competitors had to make in order to obtain favorable terms of access. See id. at 738. In reversing the Eighth Circuit and upholding the rule, the Supreme Court rejected the argument that the rule undercut incumbents' bargaining power and contravened the purpose of the negotiation provisions of the FTA, and affirmed the FCC's authority to promulgate the rule on the basis that it tracked the language of a particular FTA provision (§ 252(i)) "almost exactly."

In the same opinion, the Supreme Court also reversed the Eighth Circuit's decision vacating FCC Rule 315(b), which prohibits incumbent LECs from separating already combined network elements before leasing them to competitors under the "unbundled access" provisions of the FTA. The Eighth Circuit determined that the rule should be vacated because it required leased access to "bundled" elements, in violation of the FTA. The Supreme Court disagreed, finding that, although § 251(c)(3) directs incumbents to grant competitors access to "unbundled" elements that the competitors may then "combine" and thus "forbid[s] incumbents to sabotage network elements that are provided in discrete pieces," § 251(c)(3) "does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form." *Iowa*, 119 S. Ct. at 737. Noting that "§ 251(c)(3) is ambiguous on whether leased network elements may or must be separated," the Court concluded that the FCC's rule, which effectively requires incumbents to lease "bundled" elements to competitors under certain circumstances, "is entirely rational" even though the rule "could allow entrants access to an entire preassembled network." *Id.* at 737-38.

U.S. 496 (1941), are met, or if abstention is warranted under the Johnson Act, 28 U.S.C. § 1342 (1994).

Burford abstention is appropriate where "timely and adequate state-court review is available" and:

(1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or

(2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 361 (1989) (*NOPSI*). Although the MPSC was arguably trying to establish a "coherent policy" concerning local interconnection rates, Michigan state law clearly authorizes the dictates in the Commission's February 25 order. Because Congress has invested the federal courts with primary responsibility for adjudicating FTA challenges to state telecommunications regulations, and because this case does not concern a disputed issue of state law, but rather a potential conflict between state and federal telecommunications laws, *Burford* abstention is inappropriate. *See, e.g., NOPSI*, 491 U.S. at 361 (holding *Burford* abstention inappropriate because the plaintiffs' case did not "involve a state-law claim, nor even an assertion that the federal claims are in any way entangled in a skein of state law that must be untangled before the federal case can proceed") (internal quotation marks and citation omitted).

Pullman abstention is similarly inappropriate because *Pullman* abstention is warranted only when a state law is challenged and resolution by the state of certain questions of state law may obviate the federal claims, or when the challenged law is susceptible of a construction by state courts that would eliminate the need to reach the federal question. *See, e.g., Babbit v. United Farm Workers National Union*, 442 U.S. 289, 306 (1979) (interpreting *Pullman*). In this case, to abstain pending state review of GTE's claims would be inappropriate because the dictates of the Michigan Telecommunications Act (pursuant to which the MPSC issued the

challenged order) are clear and the MPSC has already considered GTE's objections to the February 25 order, denied them, and denied GTE's request for rehearing.

Younger abstention is also inappropriate. In *Younger*, the Supreme Court held that federal courts should abstain from deciding cases within their jurisdiction only when: (1) there are ongoing state court proceedings; (2) those proceedings involve important state interests; and (3) the parties have an adequate opportunity to raise constitutional issues in the state proceedings. *See GTE MobileNet of Ohio v. Johnson*, 111 F.3d 469, 481 (6th Cir. 1997). The MPSC contends that all three conditions for Younger abstention are met, and emphasizes that state proceedings are currently ongoing despite the Michigan courts' rejection of GTE's claims because GTE has a right pursuant to Mich. Comp. Laws § 462.26 to seek review of the Commission's February 25 order (and the Commission's May 11, 1998, order denying rehearing) in the Michigan Court of Appeals.

That GTE has a right to appeal does not, however, satisfy the requirement that a federal court may abstain under Younger only if the parties are involved in ongoing state proceedings. The Supreme Court held in *NOPSI* that the availability, or even the pendency, of state court review of a "legislative or executive action" does not justify *Younger* abstention. *NOPSI*, 491 U.S. at 368 (noting that requiring abstention in deference to state judicial proceedings reviewing "legislative or executive action" would "make a mockery of the rule that only exceptional circumstances justify [abstention]"). Because the MPSC's February order cannot be described as "judicial" in nature, *Younger* does not require this court to abstain from ruling on the merits of GTE's claims. *See id.* at 371 (holding that a "judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist," and concluding that the "establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind"). Indeed, *Younger* abstention would be especially inappropriate in this case because the Michigan Court of Appeals has already considered and rejected the merits of GTE's challenge to the MPSC's 1997 orders. *See GTE North, Inc. v. MPSC*, No. 198324 (unpublished opinion, December 30, 1997) (affirming over GTE's objection the rates established in the MPSC's order in case U-10860 and affirming the MPSC's directive to

conduct the cost study proceedings that gave rise to the dispute in this case).

Finally, the district court is not required to abstain from deciding this case under the Johnson Act, which prohibits federal courts from enjoining compliance with state orders affecting rates charged by a public utility only when, among other things, "[j]urisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution." 28 U.S.C. § 1342 (1994). The Johnson Act does not require abstention in this case because jurisdiction over GTE's claims is based on alleged violations of its rights under the FTA.

In addition to the fact that the requirements for abstention established by the Supreme Court are not satisfied in this case, abstention is not warranted here because waiting to review the propriety of the February 25 order until it is incorporated into a final arbitration agreement will deny GTE a timely and adequate remedy at law. GTE, whose suit against the MPSC is based on *Ex parte Young*, 209 U.S. 123 (1908), cannot recover damages for injuries sustained under the challenged order. Because *Young* limits GTE's recovery to prospective injunctive relief, waiting to decide this case until the Commission approves a final agreement incorporating the challenged terms may well deny GTE a timely and adequate remedy by precluding recovery for harm sustained while the order was in effect.[6]

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[6] GTE was prudent to sue the Michigan commissioners under *Ex parte Young* because it is virtually certain that a state utility commission's decision to accept regulatory authority under the FTA cannot legitimately be construed as a valid waiver of sovereign immunity. The Supreme Court's recent decisions in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 119 S. Ct. 2199, and *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 119 S. Ct. 2219 (1999), undermine earlier circuit court decisions holding that the Eleventh Amendment does not bar suits against state utility commissions because such commissions constructively waive their immunity from suit by participating in the regulatory scheme established by the FTA. *See, e.g., MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 183 F.3d 567, 567-68 (7th Cir. 1999) (granting a petition for rehearing and directing the parties to file supplemental briefs on the impact that the Supreme Court's decisions in *Alden v. Maine*, 119 S. Ct. 2240 (1999), and the *College Savings Bank* cases had on the court's earlier decision).

It is precisely because the waiver doctrine no longer provides a reliable basis for seeking relief against state commissions that we disagreed in *Michigan*

For the foregoing reasons, abstention is not warranted in this case.

IV

In holding that GTE's claims fell within the purview of § 252(e)(6), the district court effectively denied GTE any assurance of federal review because under § 252(e)(6), federal review is wholly contingent on a state commission's decision to approve or reject a final interconnection agreement incorporating the terms of any challenged order, an event that need not occur for a competitor to enforce the tariffs established in the February 25 order against GTE. The challenged order was the product *not* of § 252 proceedings, but of proceedings initiated by the MPSC under Michigan law, and as such may be independently enforced by the Michigan courts. The district court therefore erred in concluding that § 252(e)(6) provides an adequate opportunity for deferred review under either *Califano* or *Thunder Basin*.

It is presumably because § 252(e)(6) does not provide GTE with an adequate assurance of federal review that the MPSC does not seriously defend on appeal the district court's conclusion that §252(e)(6) satisfies *Thunder Basin* because it defers, but does not preclude, federal review. Rather, the MPSC argues that "there is neither a need nor a requirement for the federal District Court to review [the February 25 order]" because that order is fully reviewable in Michigan state court. Although this argument may be relevant to the question whether the district court should abstain from deciding GTE's claims at this time, *see Romine v. CompuServe Corp.*, 160 F.3d 337, 340-41 (6th Cir. 1998), it is wholly irrelevant to the question whether the court has jurisdiction to hear GTE's federal preemption challenges to a state commission order entered in a non-FTA proceeding.

Bell Telephone Co. v. Climax Telephone Co., 202 F.3d 862 (6th Cir. 2000), with the Seventh Circuit's decision in MCI and premised our conclusion that the plaintiff could proceed with its suit against the MPSC solely on *Ex parte Young*, rather than waiver, grounds.

In upholding jurisdiction over GTE's claims under § 1331, we emphasize that it is precisely because state utility commissions play such a critical role in administering the FTA's regulatory framework that they must operate strictly within the confines of the statute. We therefore REVERSE the district court's ruling, uphold its jurisdiction under § 1331, and remand the case for determination on the merits if and when the district court finds GTE's claims ripe for review.[7] In so doing, we hope to further the goals of the FTA by affirming state commissions' statutory role and rejecting an unduly expansive interpretation of § 252(e)(6) that would permit state regulatory authorities to insulate from federal review orders alleged to be contrary to, or preempted by, federal law.

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[7] To determine whether a claim is ripe for decision, the reviewing court must consider both the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). A case is "fit for judicial decision" where the issues raised are purely legal ones and where the agency rule or action giving rise to the controversy is final and not contingent upon future uncertainties or intervening agency action. *Ibid.* The hardship prong concerns the extent of the burden imposed on the petitioner who would be compelled to act under threat of enforcement of the challenged law. *See id.* at 153.

In this case, the district court must decide whether the ripeness inquiry demands that one of GTE's competitors actually request access at the tariff rate before deciding the case, or whether the order itself gives rise to a justiciable claim because it imposes an immediate obligation on GTE to sell network elements at predetermined rates.

Supreme Court, U.S.
FILED
JUL 24 2000

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No. 99-1878

In the Supreme Court of the United States

JOHN G. STRAND, ET AL., PETITIONERS

v.

MICHIGAN BELL TELEPHONE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the commissioners of the Michigan Public Service Commission are amenable to suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), in an action seeking review of an interconnection agreement approved by the Commission pursuant to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

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In the Supreme Court of the United States

No. 99-1878

JOHN G. STRAND, ET AL., PETITIONERS

v.

MICHIGAN BELL TELEPHONE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 202 F.3d 862.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2000. A petition for rehearing was denied on February 16, 2000 (Pet. App. 39a-40a). The petition for a writ of certiorari was filed on May 15, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Telecommunications Act of 1996 (Telecommunications Act), Pub. L. No. 104-104, 110 Stat. 56, effected a comprehensive overhaul of telecommunications regulation designed to "open[] all telecommunications markets to competition." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996); see generally *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999); Pet. App. 5a. This case concerns the provisions of the Telecommunications Act aimed at enhancing competition in local telecommunications markets.

1. For many years, most telephone service in the United States was provided by AT&T and its corporate affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, 15 U.S.C. 1 *et seq.*, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *AT&T*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree that required it to divest its local exchange operations. The newly independent Bell Operating Companies continued to provide monopoly local exchange service in their respective regions. What remained of AT&T continued to provide nationwide long-distance service. See H.R. Rep. No. 204, 104th Cong., 2d Sess. 48-50 (1996).

a. In considering how to encourage competition in local telephone markets, Congress recognized that the economic barriers to entry into those markets would remain formidable, even if the regulatory restrictions on competition were removed. H.R.

Conf. Rep. No. 458, *supra*, at 113. It would be economically impracticable, at least with the current technology, for even the largest prospective competitor to duplicate an incumbent carrier's local network—*i.e.*, to create a new network of switches and a new infrastructure of loops connecting every house and business in a calling area to those switches and thus to one another. Moreover, a prospective competitor could not gradually enter the market, through partial duplication of local exchange facilities, without rights of access to the existing network; the competitor would win few customers if, for example, those customers could call only one another and not customers of the incumbent's separate (and already established) network.

Accordingly, Congress, in Section 251 of the Telecommunications Act, provided for prospective competitors to enter local telephone markets by using incumbent carriers' own networks in three distinct but complementary ways. First, incumbents are required to "interconnect" their networks with those of new entrants, and to do so at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(2).[1] Second, new entrants are entitled to gain access to elements of an incumbent's network "on an unbundled basis"—*i.e.*, to lease individual network elements (loops, switching capability, etc.) at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3). Third, new entrants are permitted to buy an incumbent's retail services "at wholesale rates" and to resell those serv-

[1] All citations to provisions of the Telecommunications Act, as codified in Title 47, are to Supp. III 1997.

ices to end users. 47 U.S.C. 251(c)(4). Incumbents are also required to provide physical access to their poles, ducts, conduits, and rights-of-way to allow new entrants to install their own facilities, as well as physical access to their premises to permit interconnection among networks. 47 U.S.C. 251(b)(4) and (c)(6).

The Telecommunications Act requires incumbents to negotiate in good faith with new entrants regarding interconnection, access to facilities, resale of services, and the other arrangements contemplated by the Act. 47 U.S.C. 251(c), 252. The Act provides for arbitration of such "interconnection agreements" if the parties are unable to resolve all outstanding issues through negotiation. 47 U.S.C. 252(b).

b. The Telecommunications Act permits, but does not require, state public utility commissions to assume regulatory authority over interconnection agreements, set the terms and conditions for those agreements (subject to the standards set forth in the Act and regulations promulgated pursuant to the Act), and exercise review and enforcement authority. If the state commission elects not to assume regulatory authority, the Federal Communications Commission will perform that role. 47 U.S.C. 252(e)(5).

The extent of the regulatory responsibilities of the state public utility commission, or alternatively the FCC, depends, in part, on whether the interconnection agreement was negotiated or arbitrated. Negotiated agreements are subject to review by the state commission (or the FCC if the state commission chooses not to act) to determine whether they discriminate against non-party carriers and are consistent with the public interest, convenience, and necessity. 47 U.S.C. 252(e)(2)(A).

If the agreement is submitted to arbitration, the state public utility commission (or the FCC) will resolve any open issue, including the rates, terms, and conditions under which new competitors will enter the local market, as well as the prices that both the incumbent and new providers will pay one another for transport and termination of calls. The Act sets forth standards for state commissions to follow in setting such rates and requires state commissions to "provide a schedule for implementation of the terms and conditions by the parties to the agreement." 47 U.S.C. 252(c)-(d)(2). The state commissions are also bound by FCC regulations implementing the Act. 47 U.S.C. 252(e)(2)(B). Arbitrated agreements are subject to review by the state commission. 47 U.S.C. 252(e)(1) and (2)(B). If the state commission does not take action on an arbitrated agreement within the allotted time period, the agreement is deemed approved. 47 U.S.C. 252(e)(4).

The Telecommunication Act provides that any party "aggrieved" by a determination of a state public utility commission may file suit in federal district court for a determination of "whether the agreement or statement meets the requirements of" Sections 251 and 252 of the Act. 47 U.S.C. 252(e)(6). If the FCC rather than the state commission has assumed the regulatory role, the Hobbs Act, 28 U.S.C. 2342 (1994 & Supp. IV 1998), authorizes federal appellate court review of the FCC's orders.

2. Climax Telephone Company, a potential new entrant into the local telephone market in Battle Creek and Kalamazoo, Michigan, sought to negotiate an interconnection agreement with Ameritech Michigan, the incumbent local exchange carrier. The parties' negotiations were unsuccessful. Climax

petitioned the Michigan Public Service Commission (MPSC) for arbitration pursuant to Section 252(b) of the Telecommunications Act. The MPSC appointed a panel to arbitrate the matter and subsequently approved the resulting agreement. Pet. App. 3a-4a, 18a-33a.

Ameritech sought review of the interconnection agreement in the United States District Court for the Western District of Michigan pursuant to Section 252(e)(6) of the Telecommunications Act. Ameritech named as defendants Climax and the three MPSC commissioners. The commissioners moved to dismiss the action against them on Tenth and Eleventh Amendment grounds.

The district court denied the motion. Pet. App. 12a-16a. The court held that the MPSC had impliedly waived its immunity to suit under the Eleventh Amendment by choosing to arbitrate and approve interconnection agreements under the Telecommunications Act. *Id.* at 14a. The court also held that the Act did not violate the Tenth Amendment because state commissions could elect not to exercise regulatory authority over interconnection agreements. *Ibid.*

3. The commissioners took an interlocutory appeal. The United States and the FCC intervened to defend the constitutionality of the Telecommunications Act. The Sixth Circuit affirmed. Pet. App. 1a-11a.

First, the court of appeals held that the commissioners are amenable to suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), because "Ameritech is seeking injunctive relief against an ongoing violation of federal law." Pet. App. 10a; see also *id.* at 8a-9a. The court observed that the MPSC "not only

approved the interconnection agreement, it is responsible for ongoing enforcement of the agreement." *Id.* at 8a. Having concluded that the action against the commissioners could proceed under *Ex parte Young*, the court had no need to consider the alternative ground on which the district court rejected the commissioners' claim of sovereign immunity, *i.e.*, that the MPSC had impliedly waived its sovereign immunity by choosing to arbitrate and approve interconnection agreements.

Second, the court of appeals rejected the commissioners' argument that the action constituted a "'commandeering' of state resources" in violation of the Tenth Amendment. Pet. App. 9a. The court reasoned that Congress did not compel the State to regulate interconnection agreements under the Telecommunications Act. Rather, the State, through the MPSC, chose to do so. *Ibid.*

Third, the court of appeals held that the commissioners were proper parties to the action. Pet. App. 9a-10a. The commissioners had argued that the only proper parties to an action under Section 252(e)(6) are the signatories to the interconnection agreement. The court explained that "it is the [commission's] function, not the other party's, to enforce the agreement." *Id.* at 10a.

In a concurring and dissenting opinion, Judge Cole agreed with the majority's *Ex parte Young* ruling. He dissented from the majority's rulings on the remaining issues solely on the ground that those issues were not proper subjects of an interlocutory appeal. Pet. App. 11a.

ARGUMENT

The Sixth Circuit's holding that the *Ex parte Young* exception to the doctrine of sovereign immunity permits this action against the commissioners of the Michigan Public Service Commission is correct and does not conflict with the holdings of this Court or of any other circuit. Indeed, the only other court of appeals that has decided the issue expressly "adopt[ed] the Sixth Circuit's rationale" in this case. *MCI Telecomm. Corp.* v. *Public Serv. Comm'n*, No. 99-4203, 2000 WL 783382, at *9 (10th Cir. June 20, 2000).[2] This Court's review of this "straightforward *Ex parte Young* case" (Pet. App. 8a) is therefore not warranted.

1. This Court has recognized that the doctrine of sovereign immunity reflected in the Eleventh Amendment does not preclude an action that seeks injunctive relief against individual state officials to assure their prospective compliance with federal law. See *Ex parte Young*, 209 U.S. 123 (1908); see also *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 102 (1984) (*Pennhurst II*); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997) (acknowledging "the continuing validity of the *Ex parte Young* doctrine"). As the Court has observed, the *Ex parte Young* exception to state sovereign immunity is

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[2] In addition, the Tenth Circuit, like the district court below (see Pet. App. 14a-15a), held that the state commission had impliedly waived its sovereign immunity by electing to exercise regulatory authority over interconnection agreements pursuant to the Telecommunications Act. See *MCI Telecomm. Corp.*, 2000 WL 783382, at *8. In this case, the Sixth Circuit did not address that alternative ground for rejecting petitioners' sovereign immunity claim.

"necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Pennhurst II*, 465 U.S. at 105; accord *Alden* v. *Maine*, 527 U.S. 706, 747-748 (1999).

The court of appeals correctly held that this action fits comfortably within the *Ex parte Young* exception because respondent Ameritech "is seeking injunctive relief against an ongoing violation of federal law." Pet. App. 10a. As noted above, the Telecommunications Act vests state public utility commissions with the authority to arbitrate and approve interconnection agreements in accordance with the requirements of federal law, specifically Sections 251 and 252 of the Act and the FCC regulations. Once approved, an interconnection agreement imposes ongoing obligations on the parties to comply with its terms; moreover, as several courts of appeals have recognized, state commissions possess continuing authority under the Act to enforce such agreements.[3] Congress provided for federal court review of state commission orders approving and enforcing interconnection agreements to ensure that those orders comport with federal law. 47 U.S.C. 252(e)(6).

Accordingly, in naming the MPSC commissioners as parties in this action under Section 252(e)(6) challenging their order approving the interconnection agreement, Ameritech is simply seeking to eliminate

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[3] See *Southwestern Bell Tel. Co.* v. *Public Util. Comm'n*, 208 F.3d 475, 479-480 (5th Cir. 2000); *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 804 (8th Cir. 1997), rev'd in part and aff'd in part on other grounds *sub nom. AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Illinois Bell Tel. Co.* v. *Worldcom Technologies, Inc.*, 179 F.3d 566, 570-571 (7th Cir. 1999).

prospectively its obligation to comply with an order that it contends is contrary to federal law. That is the precise circumstance in which the *Ex parte Young* exception is appropriately employed. See *Coeur d'Alene Tribe*, 521 U.S. at 276- 277 (principal opinion) (observing that *Ex parte Young* and its progeny teach "that where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar").[4] Cf. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999) (observing that "there is no doubt * * * that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel").

2. Petitioners contend that the *Ex parte Young* exception is unavailable in this case for several reasons. Petitioners are mistaken.

First, petitioners argue (Pet. App. 5-12) that *Ex parte Young* review is improper under *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). But *Seminole Tribe* turned on the existence of a "carefully crafted and intricate remedial scheme," *id.* at 73-74, that, unlike the statutory scheme in this case, indicated that Congress did not intend more expansive remedies to be available under *Ex parte Young*.

In *Seminole Tribe*, this Court reviewed provisions of the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 201 Stat. 2467, that established a

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[4] Seven of the nine Justices in *Coeur d'Alene Tribe* reaffirmed that the inquiry governing whether state officials are amenable to suit under *Ex parte Young* is "whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." 521 U.S. at 296 (O'Connor, J., concurring); *id.* at 298 (Souter, J., dissenting).

framework for States to negotiate compacts with Indian Tribes. Under IGRA, the only remedy for a State's failure to negotiate in good faith was an order directing the State to conclude a compact within 60 days; the only remedy for a State's failure to conclude a compact within 60 days was an order requiring each party to submit its proposed compact to a mediator; and the only remedy for a State's refusal to accept the compact selected by the mediator was a notice to the Secretary of the Interior, who would then prescribe regulations. See *Seminole Tribe*, 517 U.S. at 74-75. The Court reasoned that "[b]y contrast with this quite modest set of sanctions, an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court." *Id.* at 75. The Court therefore held that Tribes could not seek to enforce their IGRA rights in actions against state officials under *Ex parte Young*, because such actions would enable the Tribes to obtain more expansive remedies than Congress intended to provide in IGRA. *Id.* at 74-76.

There is no reason similarly to conclude that an injunction under *Ex parte Young* would sweep more broadly than Congress intended in enacting the Telecommunications Act. In contrast to the statute in *Seminole Tribe*, the Telecommunications Act does not narrowly circumscribe the remedies available to parties challenging the orders of state public utility commissions with respect to interconnection agreements. The Act provides for a process of negotiation between the parties, followed by arbitration, if necessary, by the state commission, and state commission review of the ultimate agreement. See 47 U.S.C. 252(a)-(e)(5). Once an agreement is approved or re-

jected by the state commission, federal court review is available "to determine whether the agreement or statement meets the requirements" of the Act. 47 U.S.C. 252(e)(6). An action under *Ex parte Young* is fully consistent with the remedy contemplated by Congress. It does not expand the remedies or the scope of judicial review available under the Act.[5]

Contrary to petitioners' contention (Pet. 9-10), when Congress provided in the Telecommunications Act for judicial review of "State commission actions," 47 U.S.C. 252(e)(6), Congress did not implicitly preclude the exercise of jurisdiction over state commissioners under *Ex parte Young*. Nothing in *Seminole Tribe* requires a contrary conclusion. There, in ascertaining whether Congress intended to subject state officials to jurisdiction under *Ex parte Young*, the Court observed that IGRA repeatedly referred to the "State" rather than to a state official and that the duty imposed by the Act "to 'negotiate * * * in good faith to enter into' a compact with another sovereign * * * is not of the sort likely to be performed by an individual state executive officer or even a group of officers." 517 U.S. at 75 n.17. In contrast, this case involves regulatory agency actions

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[5] *Ex parte Young* would not, as petitioners suggest (Pet. 9), permit a litigant to secure judicial review under Section 252(e)(6) before a state commission has approved or rejected an interconnection agreement. Section 252(e)(6) provides for judicial review solely to determine "whether the agreement * * * meets the requirements of section 251 of this title and this section." Accordingly, before an interconnection agreement has been approved, there would be no basis for judicial review under Section 252(e)(6). *Ex parte Young* provides only a basis for jurisdiction over the commissioners, not a cause of action under the Telecommunications Act.

of the sort typically performed by one official or a small group of officials. It is commonplace in judicial review of agency actions to name agency officials as defendants.

Second, petitioners assert (Pet. 12-13) that subjecting them to suit under *Ex parte Young* would permit the federal courts to "control the exercise of the discretion of an officer." *Ex parte Young*, 209 U.S. at 158. Petitioners' argument rests on an incorrect premise. State public utility commissions have no discretion to impose obligations in interconnection agreements that are contrary to federal law. See 47 U.S.C. 252(c)(1) and (e)(2). Accordingly, where a federal court enjoins state commissioners from enforcing a provision of an interconnection agreement on the ground that the provision violates federal law, the commissioners are "simply [being] prohibited from doing an act which [they] ha[ve] no legal right to do." *Ex parte Young*, 209 U.S. at 159; see *Fond du Lac Band of Chippewa Indians* v. *Carlson*, 68 F.3d 253, 256 (8th Cir. 1995) (discretionary act exception to *Ex parte Young* is inapplicable where suit is brought to prevent future violations of treaty rights).

Finally, petitioners contend (Pet. 14-16) that *Ex parte Young* is inapplicable because the MPSC's arbitration and approval of the interconnection agreement occurred in the past. The relevant question under *Ex parte Young* is not, however, whether the state officials' action that the plaintiff is challenging occurred in the past. The question instead is whether the plaintiff is seeking prospective relief from the ongoing impact of the state officials' action on its federal rights. Indeed, the Fourth Circuit recently rejected an argument, similar to petitioners' here,

that *Ex parte Young* did not permit an action to enjoin a past decision of a state regulatory commission that had continuing effects on the plaintiff railroads. See *CSX Transp., Inc.* v. *Board of Pub. Works*, 138 F.3d 536, 542, cert. denied, 525 U.S. 821 (1998). "If we were to accept this argument," the court explained, "no injunction could issue pursuant to *Ex parte Young* if the action to be enjoined had already been decided upon by a state official. But, of course, plaintiffs have no way to know that they must sue to enjoin an official's action until after the official has decided to take that action." *Ibid.*; cf. *Milliken* v. *Bradley*, 433 U.S. 267, 288-290 (1977) (recognizing the propriety of injunctive relief under *Ex parte Young* to require state officials to provide remedial education programs to eliminate the vestiges of past racial discrimination).

As the court of appeals concluded in this case (Pet. App. 9a), Ameritech is alleging "an ongoing violation of federal law." The interconnection agreement arbitrated and approved by the MPSC remains in force, imposing continuing obligations on the parties that Ameritech contends are contrary to the requirements of the Telecommunications Act. And the MPSC retains the authority to enforce the agreement against Ameritech. See note 3, *supra* (citing cases recognizing such authority). It is thus incorrect for petitioners to characterize this case (Pet. 16) as involving only "an alleged past wrong" as opposed to an alleged "continuing wrong" cognizable under *Ex parte Young*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2000

(3)

No. 99-1878

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN G. STRAND, JOHN C. SHEA, and DAVID A. SVANDA, Commissioners of the Michigan Public Service Commission

Petitioners,

v.

MICHIGAN BELL TELEPHONE CO. and CLIMAX TELEPHONE CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

AMICI CURIAE BRIEF OF THE STATE COMMISSIONS OF PENNSYLVANIA, ARKANSAS, CALIFORNIA, FLORIDA, HAWAII, KENTUCKY, MAINE, MARYLAND, MONTANA, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, TENNESSEE, UTAH, VIRGINIA AND WISCONSIN, AND THE STATES OF DELAWARE, INDIANA AND OHIO SUPPORTING PETITIONERS

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INTERESTS OF THE AMICI STATES

The Pennsylvania Public Utility Commission, Arkansas Public Service Commission, California Public Utilities Commission, State of Delaware, Florida Public Service Commission, Hawaii Public Utilities Commission, State of Indiana, Kentucky Public Service Commission, Maine Public Utilities Commission, Maryland Public Service Commission, Montana Public Service Commission, Public Utilities Commission of Nevada, New Hampshire Public Utilities Commission, Public Service Commission of New York, North Carolina Utilities Commission, State of Ohio, Tennessee Regulatory Authority, Public Service Commission of Utah, Virginia State Corporation Commission, and Public Service Commission of Wisconsin (hereinafter "Amici States") submit this brief in support of Petitioners John G. Strand, John C. Shea, and David A. Svanda, Commissioners of the Michigan Public Service Commission. The Amici States have obtained the written consent of all parties to this proceeding to file this brief.[1]

The Amici States are either State Attorneys General representing the broad interest of the State or State administrative agencies with broad regulatory authority over public utility companies, including regulatory jurisdiction with respect to intrastate operations of telecommunications carriers.[2] Each of the State agency *amici* is a "State commission" under section 252 of the federal Tele-

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[1] No counsel for a party authored the brief in whole or in part and no persons other than the Amici States made a monetary contribution to the preparation of this brief.

[2] The Virginia State Corporation Commission, having regulatory authority over public utility companies, is a "permanent commission" established by Article IX, Section 1, of the Constitution of Virginia, and is not an executive branch agency.

communications Act of 1996 (the Act).[3] The instant case involves the sovereign immunity of State commissions and the immunity of the individual commissioners who serve on those State commissions. Thus, the Amici States have a vital interest in the ultimate outcome of the instant case.

An additional interest is that State commissions across the country are allocating scarce resources to challenge federal court jurisdiction in pending section 252(e)(6) actions under the Act. There are at least five other Circuit Courts of Appeal and numerous district courts presently considering the scope of the sovereign immunity defense in section 252(e)(6) actions.[4] Granting the writ petition and issuing a decision in

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[3] 47 U.S.C. § 252; 47 U.S.C. § 153(41) (defining "State commission" as "the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.").

[4] *BellSouth Telecommunications, Inc. v. North Carolina Util. Comm'n*, Nos. 99-1845 *et al.* (4th Cir. filed June 21, 1999) and *Bell Atlantic-Maryland, Inc. v. MCI Worldcom, Inc.*, Nos. 99-2459, *et al.* (4th Cir. filed October 29, 1999), argued seriatim May 1, 2000; *AT&T Communications v. BellSouth Telecommunications, Inc.*, No. 99-30421 (5th Cir. filed April 12, 1999); *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir.), *denial of reh'g vacated and reh'g granted*, 183 F.3d 567 (7th Cir. 1999) (reargued Dec. 2, 1999); *Wisconsin Bell, Inc. v. Public Serv. Comm'n of Wisconsin*, Nos. 99-2805 *et al.* (7th Cir. filed July 21, 1999); *U S West Communications, Inc. v. Garvey*, Nos. 99-3071, *et al.* (8th Cir. filed July 30, 1999); *Southwestern Bell Telephone Co. v. Connect Communications Corp.*, No. 99-3953 (8th Cir. filed Oct. 21, 1999); *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, No. 00-13505FF (11th Cir. filed July 7, 2000). The Kentucky Commission also has a pending jurisdictional challenge in the Sixth Circuit. *MCI Telecommunications Corp. v. BellSouth Telecom-munications, Inc.*, Nos. 99-5839 and 99-5873 (6th Cir. filed June 14, 1999). In addition, similar actions are pending in numerous district courts across the country. A small sampling of cases include the following: *MCI Telecommunications Corp. v. New York Tel. Co.*, No. CV-97-1600 (N.D.N.Y. filed October 31, 1997); *Illinois Bell Tel. Co. v. ICC*, No. 98 C 2686 (N.D. Il. filed May 1, 1998); *U S West Communications, Inc. v. Montana Pub. Svc. Comm'n*,

the instant case will provide the necessary direction to resolve these important jurisdictional disputes and allow the courts, State commissions, and carriers to turn their attention to substantive disputes arising from interconnection agreement determinations made by State commissions.

In support of the Petitioners' request for a writ of certiorari, this brief contains entirely new arguments not heretofore advanced by the parties in this case.

SUMMARY OF ARGUMENT IN FAVOR OF GRANTING THE WRIT

The United States Court of Appeals for the Sixth Circuit has decided an important question of federal law that has not been, but should be, settled by this Honorable Court. Contrary to the constitutional doctrine of sovereign immunity, the Court of Appeals below has decided that the individual members of a State commission may be sued in federal court without their consent when the State commission makes a determination to approve or reject an interconnection agreement under section 252 of the Telecommunications Act of 1996, 47 U.S.C. § 252. The Sixth Circuit held erroneously that it could lift the jurisdictional bar pursuant to the *Ex parte Young* doctrine.[5]

No. CV98-42-H-CCL (Mont. filed October 7, 1998); *Ameritech Ohio v. ICG Telecom and the PUCO Commissioners*, Case No. C2-99-552 (S.D. Ohio filed June 11, 1999); *Pacific Bell v. California Pub. Util. Comm'n*, No. C 99-4479 CW (N.D. Cal. filed Aug. 25, 1999); *Nevada Bell v. Pubic Util. Comm'n of Nevada*, No. CV-N-99-492-ECR(PHA) (Nev. filed Sept. 3, 1999); *Pacific Bell v. Pac-West Telecommunications*, No. C 99-4480 CW (N.D. Cal. filed Oct. 6, 1999); and *Bell Atlantic-Pa., Inc. v. Pennsylvania Pub. Util. Comm'n*, No. 99-CV-5391 (E.D. Pa. filed Oct. 29, 1999).

[5] *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862 (6th Cir. 2000). *Accord MCI Telecommunications Corp. v. Public Serv. Comm'n of*

The Court of Appeals' decision must be reversed and the underlying complaint dismissed. The *Ex parte Young* [6] doctrine does not apply for a number of reasons. In addition to those reasons set forth by Petitioners,[7] the Amici States assert that *Ex parte Young* does not apply because the State is the real party in interest; the constitutional doctrine of sovereign immunity bars suit

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Utah, No. 99-4203 (10th Cir. June 20, 2000) (2000 U.S. App. LEXIS 14348)(following Sixth Circuit's rationale).

[6] See *Ex parte Young*, 209 U.S. 123 (1908) (permitting a remedy against a state official who was seeking to enforce facially unconstitutional conduct on the grounds that the official was individually subject to the injunctive power of the court as his unlawful conduct stripped him of his official status and such remedy was necessary to protect the supremacy of federal law.)

In contrast to *Ex parte Young*, Congress has invited, if not directed, State commissions to make certain decisions under the Telecommunications Act of 1996, no doubt seeking to take advantage of their expertise as well as resources. Congress also authorized ordinary and limited judicial review of those agency decisions albeit in federal court. As discussed in Part I of this brief, what the Sixth Circuit's decision seeks to do is to extend *Ex parte Young* to provide federal review because, it acknowledges, abrogation and constructive waiver no longer apply in light of this Court's recent holdings. However, Petitioners argue persuasively that *Seminole Tribe* in fact prevents the Sixth Circuit's extention of *Ex parte Young*, with its broad powers designed to curb unlawful conduct, to replace the failed remedy of limited judicial review in federal court which Congress contemplated in 47 U.S.C. § 252(e)(6). Petition at 5-12.

[7] Petitioners argue that the Act's remedial scheme provides for only limited federal court review (i.e., relief to enforce "State commission" compliance with the Act), the *Ex parte Young* doctrine cannot be used to compel a State official to perform discretionary acts, and the Michigan Commission's past arbitration of an interconnection agreement authorized by section 252 of the Act cannot be characterized as an ongoing violation of federal law. Petition at iii. The Amici States endorse these arguments, but do not argue them in this brief so as not to burden the Court with repetitive arguments.

against state officials when the State is the real party in interest. Also, the suit should be dismissed because the State commission is an indispensable party under the Federal Rule of Civil Procedure 19(b). The non-applicability of *Ex parte Young* is further dictated by the availability of state courts to review State commission determinations for compliance with federal and state law.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. The Court of Appeals for the Sixth Circuit Has Misapplied the *Ex parte Young* Doctrine and Violated the Constitutional Doctrine of Sovereign Immunity

This suit is an appeal of an administrative agency decision taken by a party to the underlying state administrative agency proceeding. The appeal was lodged in federal district court pursuant to section 252(e)(6) of the Act. Section 252(e)(6) grants jurisdiction to federal district courts to review certain actions taken by a State commission. It provides in pertinent part: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6).[8]

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[8] Concomitantly, section 252(e)(4) of the Act purports to prohibit state court review of the same determinations. It provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4). The scope of this brief does not permit a full discussion of the infirmities of these provisions and their application in the federal courts. The Court should be aware, however, that there are pending challenges to the constitutionality of section 252(e)(4)'s prohibition of state court review of state administrative agency decisions. *E.g.*, *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, Nos.

It is an administrative agency, not individual officials within the agency, which defends its own decision when a party seeks judicial review of that decision.[9] Indeed, all members of a commission may not have concurred in the agency's decision. The agency is the real party in interest in such a proceeding, consistent with both federal and state law. Federal courts have routinely found state agencies to be the only proper party in an action challenging that agency's order.[10] Likewise, state laws routinely provide for appeals from State commission decisions to be filed directly and exclusively against State commissions.[11]

99-5839 and 99-5873 (6th Cir. filed June 14, 1999). The consequence of striking the prohibition is that State commission decisions under the Act would be reviewable in state courts for compliance with federal and state law, which is wholly appropriate.

[9] *But cf.* N.C. Gen. Stat. § 62-48(a) (providing that the North Carolina Utilities Commission takes no position upon appellate review of its quasi-judicial decisions where a utility had the burden of proof.)

[10] *See Ricci v. State Bd. of Law Examiners*, 569 F.2d 782, 784 (3d Cir. 1978) (Pennsylvania Supreme Court was indispensable party in proceeding to invalidate its rules); *Stevens v. Bartholomew*, 222 F.2d 804, 806 (D.C. Cir. 1955) (state agency managing highway project has sovereign immunity precluding injunction against federally-funded state highway authority); *Bomer-Blanks Lumber Co., Inc. v. Oryx Energy Corp.*, 837 F. Supp. 769, 770 (M.D. La. 1993) (collateral attack on agency's order made agency an indispensable party). Although this Court has not directly addressed this issue, it has implied that it would reach the same result. *See United Auto Workers v. Brock*, 477 U.S. 274, 291 (1986) (state agency enforcing federal law was not an indispensable party under Federal Rule of Civil Procedure 19 because the case was "not an appeal from an adverse benefit determination" under federal law).

[11] *See e.g.*, Ohio Rev. Code Ann. §§ 4903.12 & 4903.13 (Baldwin 2000) (Supreme Court of Ohio has exclusive jurisdiction to review orders of Public Utilities Commission of Ohio); Pennsylvania Const., Art. V, § 9 (guaranteeing right of appeal from a state administrative agency to the appropriate state court); 42 Pa. C.S. § 763 (providing for review of agency orders in the Commonwealth Court of Pennsylvania); and Kentucky Rev.

In this case, the agency itself was not named as a defendant, rather the suit was brought against the individual members of the Michigan Commission. Impermissibly, the Court of Appeals below sanctioned an obvious violation of the constitutional doctrine of sovereign immunity by allowing the complaint to proceed on the theory that this is a straightforward *Ex parte Young* case because the court found Michigan Bell Telephone Company d/b/a Ameritech Michigan (Ameritech) is seeking injunctive relief against "an ongoing violation of federal law." *Michigan Bell Tel.*, 202 F.3d at 868 (reproduced at Petition Appendix 10a).

In a subsequent decision, the Sixth Circuit gave further details about its rationale for applying the *Ex parte Young* doctrine in this case. The court opined:

> The Supreme Court's recent decisions in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, [527 U.S. 666 (1999)], and *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, [527 U.S. 627 (1999)], undermine earlier circuit court decisions holding that the Eleventh Amendment does not bar suits against state utility commissions because such commissions constructively waive their immunity from suit by participating in the regulatory scheme established by the [federal Telecommunications Act of 1996]. *See, e.g., MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 183 F.3d 567, 567-68 (7th Cir. 1999) (granting a petition for rehearing and directing the parties to file supplemental briefs on the impact that the Supreme Court's decisions in *Alden v. Maine*, [527 U.S. 706

Statutes, Ch. 278.410 (providing that Franklin Circuit Court is the exclusive forum for review of Kentucky Public Service Commission orders).

(1999)], and the *College Savings Bank* cases had on the court's earlier decisions).

> It is precisely because the waiver doctrine no longer provides a reliable basis for seeking relief against state commissions that we disagreed in *Michigan Bell Telephone Co. v. Climax Telephone Co.*, 202 F.3d 862 (6th Cir. 2000), with the Seventh Circuit's decision in MCI and premised our conclusion that the plaintiff could proceed with its suit against the [Michigan Public Service Commission] solely on *Ex parte Young*, rather than waiver, grounds.

GTE North, Inc. v. Strand, 209 F.3d 909, 922 n.6 (6th Cir. 2000) (reproduced at Petition Appendix 62a, 79a. n.6).

The Amici States agree that this Court's holding in the *College Savings Bank* case has left no room to argue that the Michigan Commission constructively or implicitly waived sovereign immunity by participation in the regulatory scheme of the Act. Lacking jurisdiction over the Michigan Commission, the court below erred by asserting jurisdiction personally over the individual commissioners in their official capacities. The result is repugnant to our system of federalism and extends the *Ex parte Young* doctrine in impermissible ways.

A. *Ex parte Young* Does Not Permit a Suit to Go Forward Against State Officials When the State Is the Real Party in Interest

The State of Michigan, acting through its agency, the Michigan Public Service Commission, is the real party in interest in this case and is entitled to sovereign immunity. Because this suit is in reality a suit against the State of Michigan, this suit is not authorized under the *Ex parte Young* doctrine. "The Eleventh Amendment bars a suit against state officials when 'the state is the real party in interest.'" *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89,

101 (1984). *See* U.S. Const. amend. XI. Ameritech cannot avoid this jurisdictional bar by bringing a suit for injunctive relief against the individual members of the Michigan Commission instead of the Michigan Commission itself. A suit against the State is barred regardless of whether it seeks damages or injunctive relief. *Cory v. White*, 457 U.S. 85, 91 (1982).

The reality of the situation is obvious. Ameritech submitted itself to the Michigan Commission's jurisdiction seeking a determination on terms and conditions of an interconnection agreement with another jurisdictional carrier pursuant to sections 251 and 252 of the Act, 47 U.S.C. §§ 251, 252. Indeed, Congress required Ameritech to submit to the Michigan Commission's lawful jurisdiction over the matter. 47 U.S.C. §§ 153(41), 252(e)(1). After obtaining a determination, Ameritech believed the Michigan Commission had erred in the application of state and federal law and, therefore, sought relief in federal district court. Petition at 4.

The State commission acts in the public interest of the people within its State when a State commission makes a determination to approve or reject an interconnection agreement between regulated utilities. This Honorable Court has recognized that the regulation of utilities itself "is one of the most important of the functions traditionally associated with the police power of the states." *New Orleans Pub. Serv. Inc. v. New Orleans*, 491 U.S. 350, 365 (1989). The State's sovereign interest in the use of public rights-of-way is also implicated in the review of interconnection agreements, since utilities use public rights-of-way in the provisioning of service. 47 U.S.C. § 253. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997) (discussing Idaho's sovereign interest in land and water as preventing a suit against Idaho officials under *Ex parte Young*).

The plain language of the relevant portion of the Act[12] reveals the State's interest in the review of interconnection agreements. Under the Act, all interconnection agreements must be submitted to the State commission for approval. 47 U.S.C. § 252(e)(1). A State commission reviews the agreement to determine whether it (or any portion thereof) discriminates against a telecommunications carrier not a party to the agreement and to determine whether implementation of such agreement is consistent with the public interest, convenience, and necessity. 47 U.S.C. § 252(e)(2)(A). The public interest review includes compliance with the interconnection requirements of the Act, which requirements provide for compliance with applicable State laws. 47 U.S.C. §§ 252(e)(2)(B), 251(d)(3). The review also includes the establishment of rates, a matter particularly reserved for "States." *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 384 (1999). Other provisions specifically preserve state authority to regulate. See, e.g., 47 U.S.C. § 252(e)(3) (preserving a State commission's authority to establish and enforce requirements of state law in its review of an interconnection agreement), §§ 253(b)-(c) (preserving state authority to, *inter alia*, impose requirements necessary to protect the public safety and welfare and to manage public rights-of-way), § 254(f) (preserving state authority to advance universal service in that State), and §§ 261(b)-(c) (preserving generally existing state regulations and additional state requirements that are not inconsistent with the Act). *See also* 47 U.S.C. § 271(d)(2)(B) (requiring FCC consultation with State commission on special provisions concerning Bell Operating Companies).

This Court has stated, "When suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in

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[12] Development of Competitive Markets, 47 U.S.C. §§ 251 – 261 (West 2000).

the litigation whenever state policies or procedures are at stake." *Coeur d'Alene Tribe*, 521 U.S. at 269. The general rule is that a suit brought against state officials is a suit against the sovereign if the judgment sought would interfere with the public administration or restrain the State Government from acting. *Pennhurst*, 465 U.S. at 101 n.11.

Here, Ameritech seeks to interfere with the Michigan Commission's regulation of local telecommunications markets, thus, interfering with public administration or restraining the State Government from acting. Ameritech's position that the Michigan Commission, "acting through its Commissioners,"[13] violated federal and state law is an insufficient basis to consider the suit not to be against the State for the purposes of constitutional sovereign immunity, given the commission's authority to act on the matter. A claim of error in the official's exercise of delegated power is an insufficient basis for the suit to be allowed as an exception from the constitutional doctrine of sovereign immunity. *See Pennhurst*, 465 U.S. 89. The Court of Appeals below seeks to extend *Ex parte Young* to provide a substitute for ordinary judicial review of agency decisions Congress invited, if not directed, the State commission to make. This extension of *Ex parte Young* should be rejected by this Court.

The Court of Appeals below ignored the nature of the complaint and a State's public interest considerations attendant to the approval or rejection of an interconnection agreement. The court's error is captured in footnote 1 of its opinion wherein it describes as "not important," for purposes

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[13] Paragraph 1 of the underlying amended complaint for declaratory and other relief states: "This action is brought by Ameritech Michigan under § 252(e)(6) of the Telecommunications Act of 1996 . . . to challenge certain determinations *made by the Michigan Public Service Commission* ('Commission' or 'MPSC') *acting through its Commissioners*, in arbitrating and approving an interconnection agreement . . . ." (Emphasis added.)

of the jurisdictional question, the fact that Ameritech is complaining about Michigan-specific rates established by the Commission. Petition Appendix at 4a n.1. The court below turned a blind eye to the true nature of the complaint,[14] and any decision on the merits may well interfere with the Michigan Commission's ability to regulate in the public interest. This is not permissible.

B. Federal Rules Do Not Permit the Suit to Go Forward for Failure to Join an Indispensable Party

The Act, read as a whole, demonstrates Congress's intent that State commissions, not commissioners, be parties in federal court actions reviewing their determinations. *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315, 322 (7th Cir. 1999), *reh'g granted*, 183 F.3d 567 (7th Cir. 1999) (directing parties to file supplemental briefs addressing the applicability of *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.* and other recent cases). Section 252(e)(6), the statutory basis for this suit, addresses judicial review of "State commission" actions and never once refers to individual commissioners. 47 U.S.C. § 252(e)(6). *See also* 47 U.S.C. § 252(e)(4) (attempting to strip state courts of their power to review State commission determinations as part of the scheme to transfer appeals of decisions that would ordinarily be defended by the State commission in state court to the federal court arena). Where Congress created a limited remedy for aggrieved parties, the federal courts may not substitute *Ex parte Young* as a

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[14] The nature of this suit is an ordinary appeal from an administrative agency determination raising a question as to whether the Michigan Commission correctly applied federal and state law in making its determination.

substitute if that remedy fails. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

Congress preserved a primary role for State commissions throughout the process of interconnection agreement review that is unique. No regulated carrier shares a State commission's interest in this type of case. A State commission's interest goes beyond a utility's narrow business interest to the broad public interest. To say that the relevant State commission is not the real party in interest in a subsequent court action adjudicating the propriety of the entire interconnection agreement review process is an unreasonable construction of the Act. If the public interest review of a State commission is irrelevant to the outcome, Congress simply would have required private party arbitrations without any commission involvement.

Not only is the State commission a proper party under the Act, but it is also an indispensable party under Federal Rule of Civil Procedure 19(b).[15] In other words, the State commission is not just the real party in interest, but also an indispensable party, notwithstanding sovereign immunity. But because that immunity precludes suit against a State commission in federal court, this suit should have been dismissed for inability to join the indispensable party under Rule 19. *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1349 (6th Cir. 1993); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir. 1991).

Since a State commission is an indispensable party to a federal court action challenging the validity of a State commission determination under section 252(e)(6) of the Act, the case now before this Court should have been dismissed.

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[15] The U.S. Court of Appeals for the Fourth Circuit ordered supplemental briefing on this issue. *BellSouth Telecommunications*, Nos. 99-1845 *et al.* (order issued May 2, 2000) and *Bell Atlantic-Maryland*, Nos. 99-2459, *et al.* (order issued May 2, 2000).

Dismissal was necessary due to the sovereign immunity enjoyed by the State of Michigan (absent the Commission's voluntary consent to federal court jurisdiction). The Court of Appeals below apparently recognized that Congress lacks the power to subject non-consenting State commissions to the jurisdiction of federal district courts pursuant to 47 U.S.C. § 252(e)(6).[16] *GTE North Inc.*, 209 F.3d at 922 n.6. Impermissibly, the Sixth Circuit panel attempted to resurrect Congress's unconstitutional abrogation attempt by allowing the suit to proceed against the individual commissioners under *Ex parte Young*.

The Sixth Circuit's jurisdictional end-run in this case was plainly acknowledged in its subsequent decision in *GTE North*, 209 F.3d at 922 n.6 (explaining that the Sixth Circuit had asserted jurisdiction on the basis of *Ex parte Young* in the *Climax Telephone* case now before this Court because the waiver/abrogration scheme of section 252(e)(6) is unlawful). Clearly, the assertion of jurisdiction was error. The Court of Appeals should not disregard the intent of Congress, the immunity of the States, and the Federal Rules of Civil Procedure merely to salvage a jurisdictional basis for this action.

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[16] When the 1996 Act was passed, Congress apparently believed it had Article III power to abrogate state sovereign immunity, based on *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). *Union Gas* was subsequently overruled in *Seminole Tribe*, 517 U.S. 44 (1996), when the Court found that the Commerce Clause did not provide a lawful basis for Congress to abrogate State immunity. Finally, the Court has abolished the doctrine of constructive waiver, thereby eliminating the only remaining argument supporting the validity of section 252(e)(6)'s attempted abrogation. *See College Savings Bank*, 527 U.S. 666 (1999).

II. Application of *Ex parte Young* Doctrine Is Not Necessary to Vindicate Federal Law

The non-application of the *Ex parte Young* doctrine is further dictated by the availability of state court review, notwithstanding Congress's attempt to prohibit such review. It is well established that state courts are presumed competent to review lower tribunal determinations for compliance with federal and state law. *Williams v. Taylor*, ___ U.S. ___, 120 S. Ct. 1479, 1491 (2000) (stating that state courts should have "their rightful opportunity to adjudicate federal rights"); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 486 n.7 (1999) (noting that state courts "can and do decide questions of federal law"); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962) (acknowledging "the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law"); *Pennsylvania Elec. Co. v. Pennsylvania Pub. Util. Comm'n*, 544 Pa. 475, 677 A.2d 831, 832 (1996) (reviewing State commission determination for compliance with federal law). It is also well established that courts of equity should not act when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974); *Younger v. Harris*, 401 U.S. 37, 43-44 (1971). In cases under section 252 of the Act, there is no firm basis to depart from these basic tenets of law.

The present impediment to state court review — an impediment created by Congress and found in section 252(e)(4) of the Act (purporting to prohibit state court review) — cannot withstand judicial scrutiny. At least two challenges to the constitutionality of section 252(e)(4), 47 U.S.C. § 252(e)(4), are pending in a federal appellate court. *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, Nos. 99-5839 and 99-5873 (6th Cir. filed June 14, 1999); *Wisconsin Bell, Inc. v. Public Serv. Comm'n*

of Wisconsin, Nos. 99-2805 *et al.* (7th Cir. filed July 21, 1999).[17] Essentially, the challengers argue that the Tenth Amendment to the U.S. Constitution reserves to the States the power to review the determinations of a state agency and that Congress has attempted impermissibly to interfere with a State's authority over its agencies. *See* U.S. Const. amend. X.

It is acknowledged that the underlying proceeding in this case did not address the constitutionality of section 252(e)(4). However, the Amici States bring this issue to the Court's attention to alleviate any possible concern about a utility's ability to obtain judicial review of a State commission determination if *Ex parte Young* is not applied to lift the sovereign immunity jurisdictional bar.

The Amici States submit that the Court of Appeals below erred in asserting jurisdiction on the basis of the *Ex parte Young* doctrine for this reason and the others stated above.

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[17] The Pennsylvania Public Utility Commission also has challenged the constitutionality of section 252(e)(4) in a federal court action brought under section 252(e)(6). Recently, the U.S. Court of Appeals for the Third Circuit dismissed the commission's challenge as moot due to a settlement on the merits between the disputing utilities. *Bell Atlantic-Pa., Inc. v. Nextlink Pa., L.L.P.*, No. 99-1520 (3d Cir. June 5, 2000) (order dismissing appeal and remanding to district court with directions to vacate its adverse decision and dismiss case).

CONCLUSION

For the foregoing reasons, this Court should grant the petition of the Commissioners of the Michigan Public Service Commission for a Writ of Certiorari.

Respectfully submitted,

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July 24, 2000

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No. 99-1878

IN THE
Supreme Court of the United States
OCTOBER TERM 1999

JOHN G. STRAND, JOHN C. SHEA, AND DAVID A. SVANDA,
Petitioners,

v.

MICHIGAN BELL TELEPHONE COMPANY
AND CLIMAX TELEPHONE COMPANY
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The federal Telecommunications Act of 1996 ("FTA") allows State public service commissions to choose to arbitrate and approve carrier-to-carrier interconnection agreements. The FTA specifies the remedy for carriers aggrieved by State commission action. Where Congress specifies a remedy in the context of a complex statutory scheme like the FTA, can private parties bring an *Ex parte Young* action in federal court against individual State public service commissioners seeking more expansive remedies of (i) prospective injunctive relief against enforcement of a commission-approved interconnection agreement and (ii) declaratory relief that aspects of that commission-sanctioned agreement are not consistent with, inter alia, federal law.

LIST OF PARTIES AND AFFILIATES

Pursuant to Supreme Court Rule 29.6, NARUC states as follows:

The National Association of Regulatory Utility Commissioners ("NARUC") is supported predominantly by dues paid by its State Public Utility Commission members and through revenues generated by triennial meetings of those members. NARUC has no parent company, subsidiary, or affiliate.

Parties to the case include: (1) Petitioners - John G. Strand, John C. Shea, and David A. Svanda, Commissioners of the Michigan Public Service Commission, and (2) Respondents - Michigan Bell Telephone Company d/b/a Ameritech Michigan, Climax Telephone Company, the United States of America, and the Federal Communications Commission.

A number of entities filed as amici below, including NARUC and the individual public service commissions of Ohio, Kentucky, Tennessee, Pennsylvania, and New York.

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IN THE
Supreme Court of the United States
OCTOBER TERM 1999

JOHN G. STRAND, JOHN C. SHEA, AND DAVID A. SVANDA,
Petitioners,

v.

MICHIGAN BELL TELEPHONE COMPANY
AND CLIMAX TELEPHONE COMPANY
Respondent.

INTEREST OF AMICUS CURIAE[1]

The National Association of Regulatory Utility Commissioners ("NARUC") is a quasi-governmental nonprofit organization founded in 1889. NARUC represents the government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, the telecommunications common carriers within their respective borders.

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1 In accordance with U.S. Sup. Ct. Rule 37.2(a), 28 U.S.C.A., all parties have consented to the filing of this brief and their letters are on file with the Clerk of the Court. In addition, pursuant to U.S. Sup. Ct. Rule 37.6, 28 U.S.C.A., NARUC states the following: (1) NARUC's General Counsel authored this brief with the assistance of NARUC's member commissions, (2) no counsel for a party to the decision below, or other entity, authored this brief in whole or in part, (3) no person or entity other than NARUC made a financial contribution to the preparation or submission of this brief.

Both the United States Congress and federal courts have recognized that NARUC is a proper party to represent the collective interest of the State regulatory commissions.[2]

All of NARUC's State commission members are concerned by the circuit court decision presented for review. This Court's disposition of Michigan's petition will have a critical impact on future State actions taken pursuant to the Telecommunications Act of 1996[3] and also on numerous ongoing federal district and circuit court litigation involving NARUC's members. Because of that impact, and the related inappropriate and extensive expansion of the *Ex parte Young* doctrine, *NARUC's counsel has been specifically instructed by all of its members to support the Michigan commission in this litigation.*

NARUC's member commissions regulate intrastate telecommunications services including local phone service supplied by incumbent local exchange carriers ("ILECs"),

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2 See, e.g., 47 U.S.C. § 410 (1986), where Congress calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities. Cf, 47 U.S.C. § 254 (1996). See, also, *USA v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), aff. 672 F.2d 469 (5th Cir. Unit "B" 1982); aff. en banc, 702 F.2d 532 (5th Cir. Unit "B" 1983, rev'd, 471 U.S. 48 (1985). See, also *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

3 *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. § 151 *et seq.*, Pub.L. No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) ("Act" or "FTA").

like respondent Michigan Bell Telephone Company. The State commissions are obligated to ensure that local phone service supplied by such ILECs is provided at just and reasonable rates. Emerging economic pressures and structural changes in the industry join with recent federal and State legislation to focus these regulators' attention and resources on encouraging the ILECs to take the steps necessary to allow unfettered competition in the intrastate telecommunications market. See, e.g., the FTA provisions specifying a critical role for States to assure ILEC compliance with their FTA obligations to interconnect and provide nondiscriminatory access to competitors. 47 U.S.C. § 252 (1996).

State commissions have an obvious interest in protecting their scarce resources, sovereignty, and the integrity of their procedures from non-consensual private-party suits in federal court in violation of the Eleventh Amendment. To protect these interests, NARUC continues to oppose all unwarranted expansions of the *Ex parte Young* doctrine like that permitted by the Sixth Circuit in the decision presented for review. Unless reversed, we believe the Sixth Circuit's flawed *Ex parte Young* analysis will provide the vehicle for additional, costly, and unnecessary litigation against NARUC's member commissions. Moreover, by granting certiorari, this Court can eliminate the significant diversion of federal and State resources focused on duplicative litigation on this precise issue in several federal district and circuit courts of appeal. Accordingly, NARUC urges this Court to grant certiorari and ultimately, on the merits, reverse the Sixth Circuit decision presented for review.

SUMMARY OF ARGUMENT FOR GRANTING THE WRIT

Did the Sixth Circuit err by finding the *Ex parte Young* exception to a State's Eleventh Amendment[4] immunity allows federal suits for alleged violations of the Telecommunications Act of 1996 ("FTA" or "Act")? Supreme Court precedent indicates parties may seek prospective relief in federal court against individual State officials for violations of federal law under the *Ex parte Young* doctrine only where (a) Congress has not prescribed a detailed remedial scheme and (b) no special State sovereignty interest is involved. See, e.g., *Seminole Tribe of Florida v. Florida ("Seminole Tribe")*, 517 U.S. 44, 116 S. Ct. 1114 (1996); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S. Ct. 2028 (1997); *Ex parte Young*, 209 U.S. 123 (1908). NARUC respectfully suggests that (i) Congress prescribed a specific remedial scheme targeting State arbitrations of interconnection agreements in the 1996 legislation[5] and (ii) States have a special sovereignty interest

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4 The Eleventh Amendment states:

> "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

5 The Act states:

> "In any case in which a State commission makes a determination under this section, any party aggrieved . . .may bring an action in an appropriate federal district court to determine whether the agreement. . .meets the requirements of Section 251 and this section." 47 U.S.C. § 252(e)(6).

footnote continued on next page

in the use of their public rights-of-way to ensure that their citizens receive high-quality low-cost telephone service. *Idaho v. Coeur d'Alene Tribe of Idaho*, supra; *Ex parte Young*, supra. Thus, the *Ex parte Young* exception to a State's sovereign immunity from suit in federal court does not apply in the circumstances presented for review.

ARGUMENT

INDIVIDUAL COMMISSIONERS ARE NOT SUSCEPTIBLE TO INJUNCTIONS FOR ALLEGED VIOLATIONS OF THE FTA UNDER EX PARTE YOUNG.

NARUC agrees with both the Sixth Circuit and petitioners' assertions that this Court's holding in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666; 119 S. Ct. 2219 (1999), eliminates the argument that the Michigan Commission constructively or implicitly waived sovereign immunity by participation in the FTA's regulatory scheme.[6] Moreover, NARUC contends the Sixth Circuit's holding that individual members of the Michigan commission are susceptible to injunctions for

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The Act also forbids State court review, stating "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4). Cf. *Seminole*, supra

6 "It is precisely because the waiver doctrine no longer provides a reliable basis for seeking relief against State commissions that we agreed in *Michigan Bell*. . . .with the Seventh Circuit's decision . . .and premised our conclusion that the plaintiff could proceed with its suit against the commission solely on *Ex parte Young* . . .grounds." *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000).

alleged violations of the FTA is inconsistent with this Courts pronouncements in *Ex parte Young*, 209 U.S. 123 (1908), and subsequent related decisions.[7]

A. CONGRESS PRESCRIBED A DETAILED REMEDIAL SCHEME IN THE FTA.

In *Seminole Tribe*, this Court held that the *Ex parte Young* exception to Eleventh Amendment immunity does not apply where "Congress has prescribed a detailed remedial scheme for enforcement against a State of a statutorily created right." 116 S. Ct. at 1132. Based on the facts presented, the *Seminole* decision found that a State government's alleged failure to negotiate compacts allowing gaming on Indian reservations should not result in court injunctions pursuant to *Ex parte Young* because Congress had, in fact, prescribed a detailed remedial scheme in the Indian Gaming Regulatory Act ("IGRA"). Id. The IGRA specified good faith tribe-State negotiations subject to a 60

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7 In *Ex parte Young*, a federal court enjoined a State official from bringing suit to enforce a State statute that allegedly violated the due process clause of the Fourteenth Amendment. The Court held when a State officer violates federal constitutional provisions, that officer has in effect been stripped of State authority - because the State could not be presumed to condone or authorize action that violates federal law - and can thus be sued as an individual. As discussed infra, the Supreme Court's decisions in *Seminole Tribe of Florida v. Florida*, supra, and *Idaho v. Coeur d'Alene Tribe of Idaho*, supra, "mark a significant narrowing of the scope of the *Ex parte Young* doctrine." *ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178, 1189 (10th Cir. 1998)(concluding that plaintiffs' challenges to an allegedly unequal State taxing system were not saved by *Ex parte Young*).

day deadline. If the tribe and the State could not conclude a pact in that time frame, the parties would select a mediator who picked one compact. If the State then failed to adopt it, the Secretary of Interior could then establish gaming regulations. Id., 116 S. Ct. at 1132-1133; 25 U.S.C. § 2710(d)(7)(B). As Congress constructed this remedial scheme, the Court found there was no basis for concluding that Congress also intended individual State officials to be subject to federal suits. Id., 116 S. Ct. 1133 n. 17.

The FTA presents basically the same situation. Like the IGAA, the FTA provides detailed provisions for compulsory arbitration of interconnection agreements, consisting of: (1) a 135-day initial negotiation between the incumbent local exchange carrier and their competitors, 47 U.S.C. § 252(b)(1); (2) a period of 135 days to 160 days in which a State commission may be petitioned for arbitration, 47 U.S.C.§ 252(b)(4); (3) a 25-day period for responses to the petition, 47 U.S.C. § 252(b)(3); (4) a State commission decision within nine months of the initial request for arbitration, 47 U.S.C. § 252(b)(4); (5) filing of an agreement with the Commission, which will then act between 30 and 90 days, depending upon the type of agreement, 47 U.S.C. § 252(e)(4); and (6) review of the State commission action. 47 U.S.C. § 252(e)(6). As the Seminole Court observed, it is hard to see why an aggrieved party would "suffer through" the remedies designed by Congress "when more complete and immediate relief would be available under *Ex parte Young*." *Seminole,* 116 S. Ct. at 1132. Just as the Supreme Court decided that the remedial scheme of the IGRA precluded application of *Ex parte Young*, so too the remedial scheme of the 1996 Act shows that Congress did not intend

courts to allow *Ex parte Young* actions against State officials implementing the 1996 Act.[8]

B. THE STATES HAVE SPECIAL SOVEREIGNTY INTERESTS IN THE USE OF PUBLIC RIGHTS OF WAY TO PROVIDE TELEPHONE SERVICE

In *Idaho v. Coeur d'Alene Tribe of Idaho*, supra, this Court held that the Coeur d'Alene Tribe could not invoke the *Ex parte Young* exception to Eleventh Amendment immunity to sue individual Idaho State officials over title to certain submerged lands in the State. 117 S. Ct. at 2043. That decision found that Idaho's special sovereignty interest in the land and navigable waters within its borders required that the Eleventh Amendment bar injunctions against individual Idaho officials seeking prospective injunctive relief over legal title to State land. Id. at 2040-2041. The decision emphasized that it was vital that Idaho be able to exercise its sovereignty to protect the public right to use navigable waterways. Id. at 2041-2042.

Like Idaho, Michigan and the NARUC's other member States have a special sovereignty interest in ensuring

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[8] Congress' intent to provide for review of actions by State commissions and not individual State officials is also revealed by the title of Section 252(e)(6), "Review of State commission action" and by the language of the section allowing for review "in any case in which a State commission makes a determination under this section." 47 U.S.C. § 252(e)(6). As the Supreme Court cautioned in *Seminole*, "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a State official based on *Ex parte Young*." 116 S. Ct. at 1132.

their public rights of way are used by utilities to provide safe, reliable and reasonably priced local telephone service. Just as the State of Idaho has a sovereign interest in preserving public access to its navigable waters that prevented a suit against Idaho officials under *Ex parte Young*, so too, do the States have a special interest in requiring telephone companies to provide access to their networks in public rights of way to competitors to ensure the public's interest in receiving the best possible telephone service at the lowest price. This sovereign interest is particularly keen as the States focus resources upon assuring their citizens reap the maximum benefit of the new telecommunications technologies revolutionizing telephone service.

The *Coeur d'Alene Tribe* Court was not willing to discard such special sovereignty interests by allowing *Ex parte Young* suits against individual State utility commissioners. 117 S. Ct. at 2043.[9] We believe similar restraint is warranted in this case.

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9 *Coeur d'Alene Tribe* emphasized that the courts of Idaho would answer the Tribe's claim to State lands and waters. Id. at 2035, 2037-2038, 2043. If telephone companies lack the remedy of a private suit against a State, that is solely the result of Congress' decision to preclude private suits against State commissions in State court. 47 U.S.C. § 252(e)(4). Given that § 252(e)(6) violates the Eleventh Amendment, perhaps § 252(e)(4), which is part and parcel of the same judicial review provision, should fall as well. In any event, another potential remedy for allegations of State violation of the Act may lie with the Federal Communications Commission, either through its rulemaking powers or by bringing its own suit against a State in federal court. See *Alden v. Maine*, 119 S. Ct. at 2269, where the Court notes:

footnote continued on next page

CONCLUSION

For the reasons set forth, supra, NARUC urges the Court to grant the writ of certiorari.

Respectfully submitted,

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("[t]he difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State, and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits of the first kind but not of the second").

Supreme Court, U.S.
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No. 99-1878

In the
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OCTOBER TERM, 1999

JOHN G. STRAND, JOHN C. SHEA, and DAVID A. SVANDA, Commissioners of the Michigan Public Service Commission, *Petitioners,*

v.

MICHIGAN BELL TELEPHONE CO., UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, and CLIMAX TELEPHONE CO., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

Whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in exercising their authority under the federal Telecommunications Act of 1996 to arbitrate and approve interconnection agreements between local telephone exchange carriers can be maintained under the *Ex parte Young* doctrine.

RULE 29.6 STATEMENT

Respondent Michigan Bell Telephone Company d/b/a Ameritech Michigan is a wholly-owned subsidiary of Ameritech Corporation, which is in turn a wholly-owned subsidiary of SBC Communications, Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. No publicly held company owns 10% or more of the stock of SBC Communications, Inc.

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BRIEF FOR MICHIGAN BELL TELEPHONE COMPANY d/b/a AMERITECH MICHIGAN IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 202 F.3d 862 (6th Cir. 2000). The order of the court of appeals denying the petition for rehearing with suggestion of rehearing en banc (Pet. App. 39a-40a) is unreported. The order of the district court (Pet. App. 17a) and the transcript in which the district court set forth its reasons for its decision (Pet. App. 12a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2000. The petition for rehearing with suggestion of rehearing en banc was denied on February 16, 2000. The petition for writ of certiorari was filed on May 15, 2000. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction was proper in the district court under 47 U.S.C. § 252(e)(6) and 28 U.S.C. §§ 1331 and 1337. Jurisdiction in the court of appeals was proper under 28 U.S.C. § 1291 and the collateral order doctrine. See *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

STATEMENT

A. The Telecommunications Act of 1996. This case arises under the federal Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*) ("the 1996 Act" or "the Act"). As this Court recognized last year, the 1996 Act establishes a "new federal regime" that "fundamentally restructures local telephone markets." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 378 n.6 (1999). As Justice Scalia's opinion for the Court explained, "the question"

under the Act "is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. *With regard to the matters addressed by the 1996 Act, it unquestionably has.*" *Id.* at 378 n.6 (emphasis added).

The "key provisions by which Congress sought to open local telecommunications markets to competition are 47 U.S.C. §§ 251 and 252." *Pacific Bell* v. *Cook Telecom, Inc.*, 197 F.3d 1236, 1237 (9th Cir. 1999). Sections 251 and 252 of the Act govern the formation and content of "interconnection agreements," which are the federally-mandated means of implementing the local competition provisions of the Act. Under the Act, Congress has (i) compelled incumbent local exchange carriers ("LECs") to enter into these "agreements" that permit competitors to obtain access to incumbent LEC networks at cost-based rates, and (ii) subjected incumbent LECs to "a host of duties intended to facilitate market entry" by competing LECs. *AT&T Corp.*, 525 U.S. at 371.

Section 252 of the Act prescribes the process through which a competing LEC may arrive at an agreement with an incumbent LEC for the performance of the duties established in section 251. The section 252 process essentially involves four steps: (i) negotiation, (ii) arbitration, (iii) approval (or rejection), and (iv) judicial review. To begin the process, a competing LEC asks to negotiate an interconnection agreement with the incumbent LEC. 47 U.S.C. § 252(a)(1). The parties may reach an agreement through negotiations alone. *Id.* Alternatively, either party may file a petition with the state utility commission for arbitration of "any open issues" regarding the

interconnection agreement. 47 U.S.C. § 252(b)(1).[1/] In conducting section 252 arbitrations, the state regulators are authorized to "impos[e] appropriate conditions as required to implement [section 252(c)]," provided that any conditions they impose comply with section 251 and the FCC's rules implementing it. 47 U.S.C. §§ 252(b)(4)(C), and 252(c)(1); see also *AT&T Corp.*, 525 U.S. at 373 (noting that section 252 arbitrations are "subject to § 251 and the FCC regulations promulgated thereunder"). Once the parties reach an agreement, whether through arbitration or negotiation, they must submit the agreement to the state commission for approval. 47 U.S.C. § 252(e)(1). The state commission then must determine whether to approve or reject the agreement, applying the standards set forth in the Act. 47 U.S.C. § 252(e)(2).

As the foregoing demonstrates, state regulators who participate in the federal scheme are not simply "allowed to do their own thing"; rather, they "must hew" to the lines drawn by the federal courts and the FCC. *AT&T Corp.*, 525 U.S. at 378 n.6. The mechanism for ensuring that state regulators comply with the Act is 47 U.S.C. § 252(e)(6). After the state regulators approve or reject an interconnection agreement, section 252(e)(6) authorizes "any party aggrieved" by a "determination" under section 252 to bring an action in "Federal district court"

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[1] The state commission need not participate in this process. If it does not, the Act provides that the Federal Communications Commission ("FCC") "shall issue an order preempting the State commission's jurisdiction" of the proceeding in question, and "shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." 47 U.S.C. § 252(e)(5).

to determine whether the final agreement "meets the requirements of" sections 251 and 252.[2/] And this is the sole mechanism for ensuring the primacy of federal law, because Congress expressly foreclosed state court review of such determinations. 47 U.S.C. § 252(e)(4) ("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section").

Federal judicial review of state commission determinations relating to section 252 agreements is obviously a crucial feature of the post-Act regime. As this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *AT&T Corp.*, 525 U.S. at 378 n.6. Section 252(e)(6) preserves national uniformity in the application of federal telecommunications law, notwithstanding the involvement of state regulators in implementing that law. Under section 252(e)(6), if state officials are "not regulating in accordance with federal policy," there is "no doubt" that the "federal courts * * * may bring [them] to heel" by "draw[ing] the lines to which they must hew." *AT&T Corp.*, 525 U.S. at 378 n.6.

B. The Agreement and the Challenged Order. In 1996, Climax Telephone Company ("Climax") sought to expand its local exchange service into calling areas in which Michigan Bell Telephone Company d/b/a Ameritech Michigan ("Ameritech") was the incumbent LEC. Pet. App. 2a-3a. Climax and Ameritech began negotiating an interconnection agreement under the Act, but were unable to conclude a completed agreement through negotiation alone. *Id.* at 3a. On March 10,

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[2] Section 252(e)(6) also contemplates "judicial review of the [FCC's] actions" if the state commission fails to carry out its responsibilities under the Act.

1997, Climax filed a petition for arbitration pursuant to 47 U.S.C. § 252(b)(1) with the Michigan Public Service Commission ("MPSC"). *Id.* The MPSC chose to arbitrate the remaining open issues and assigned the matter to an Arbitration Panel. *Id.* On May 21, 1997, the Panel issued its decision. *Id.* On June 25, 1997, the Commissioners issued their "Order Adopting Arbitration Agreement," which adopted the recommendations of the Panel, and ordered the parties to submit a signed interconnection agreement. Pet. App. 18a-33a. On August 13, 1997, the Commissioners issued their final "Opinion and Order" approving the Agreement. Pet. App. 34a-37a.

C. The Proceedings Below. Pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. §§ 1331 and 1337, Ameritech filed suit in federal district court against Climax and the individual Commissioners in their official capacities. Pet. App. 4a. In its complaint, Ameritech alleged that various obligations imposed on Ameritech are contrary to federal law. *Id.* Ameritech sought declaratory, injunctive, and other equitable relief from those obligations. *Id.*

Despite having participated in the arbitration and approval process under the Act, the Commissioners moved to dismiss Ameritech's complaint, asserting immunity from suit in federal court under the Eleventh Amendment to the United States Constitution.[3] Pet. App. 4a. The district court denied the

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[3] The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State,

(continued...)

Commissioners' motion. Pet. App. 12a-17a. The Sixth Circuit affirmed, holding that "the case before this court is a straightforward *Ex parte Young* case." Pet. App. 8a.[4] As the Sixth Circuit explained, "[u]nder *Ex parte Young*, suits against state officials seeking equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment." *Id.* The court then noted that (i) the Commissioners approved and are responsible for ongoing enforcement of the interconnection agreement and (ii) Ameritech alleges that the obligations imposed by the agreement violate federal law and seeks equitable relief. *Id.* at 8a-9a. On this basis, the court concluded that "Ameritech has stated a claim against the Commissioners * * * for equitable relief from an ongoing violation of federal law," and "[u]nder *Ex parte Young*, Ameritech is entitled to proceed." *Id.* at 9a.

REASONS FOR DENYING THE PETITION

The question presented in the petition clearly does not warrant this Court's review. To begin with, there is no circuit conflict on the availability of an *Ex parte Young* remedy to "bring * * * to heel" state public utility commissioners who are

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[3](...continued)
or by Citizens or Subjects of any Foreign State."

U.S. Const. amend. XI.

[4] Circuit Judge Cole dissented in part on grounds unrelated to the Commissioners petition. In regard to the issue on which the Commissioners seek certiorari, Judge Cole wrote that he is "in complete agreement with the majority's disposition of the Commissioners' Eleventh Amendment claim." Pet. App. 10a.

"not regulating in accordance with federal policy" (*AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999)) under the federal Telecommunications Act of 1996. Only one other court of appeals has addressed the question whether a party to an interconnection agreement that had been approved by a state commission could maintain a suit under section 252(e)(6) of the Act against the state commissioners in their official capacities. That court expressly "adopt[ed] the Sixth Circuit's rationale and holding" that such an action is "'a straightforward *Ex parte Young* case.'" *MCI Telecomms. Corp.* v. *Public Serv. Comm'n of Utah*, 2000 WL 783382, at *9 (10th Cir. June 20, 2000) (quoting *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000)).

In addition, notwithstanding petitioners' efforts to manufacture tension between the Sixth Circuit's decision and this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), the two are entirely consistent. In *Seminole Tribe*, this Court concluded that an *Ex parte Young* remedy was unavailable to enforce compliance with the Indian Gaming Regulatory Act, Pub. L. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. § 2701 *et seq.*) ("IGRA"), because Congress had clearly limited the methods of judicial redress under the IGRA and those limitations were inconsistent with the judicial remedies available in an *Ex parte Young* action. There are no such limitations on the methods of judicial redress under section 252(e)(6) of the Act. Indeed, *Ex parte Young* provides a federal court with the precise tool that it needs to accomplish Congress' goal in section 252(e)(6) of ensuring that state officials adhere to federal law in discharging the federal regulatory functions they undertake to perform under the 1996 Act.

Finally, petitioners' attempts to suggest that the Sixth Circuit's decision is contrary to *Ex parte Young* itself are wholly unavailing. For example, petitioners' contention that their

actions are discretionary, and thus outside the scope of *Ex parte Young* (Pet. 12-13), ignores the principle articulated in *Ex parte Young* itself that a state official lacks discretion to violate federal law. Likewise, petitioners' argument that *Ex parte Young* does not apply because their approval of the interconnection agreement that imposed the challenged obligations on Ameritech took place in the "past" (Pet. 14-16) is simply wrong. Regardless of whether the state regulatory proceedings themselves are ongoing — and they are, for the petitioners expressly reserved jurisdiction to issue further orders as necessary — there can be no question that the *effects* of the obligations imposed on Ameritech in petitioners' orders are ongoing. Ameritech remains bound by those orders, until set aside by a federal court under section 252(e)(6), and thus is entitled to seek a declaration that those orders should not be enforced because they violate federal law.

In short, petitioners have neither demonstrated the existence of a circuit conflict nor shown a conflict between the court of appeals' decision and "relevant decisions of this Court." Sup. Ct. R. 10(a) & (c). Accordingly, there are no "compelling reasons," Sup. Ct. R. 10, for granting review in this case.

I. THERE IS NO CONFLICT IN THE CIRCUITS ON THE QUESTION PRESENTED.

Prior to the Sixth Circuit's decision in this case, no federal court of appeals had addressed the question whether an action seeking prospective relief against state officials, sued in their official capacities, for alleged violations of the federal Telecommunications Act of 1996 could be maintained under the *Ex parte Young* doctrine. The Sixth Circuit's affirmative answer to that question thus was a ruling of first impression in the circuits. Since the Sixth Circuit's ruling, however, the Tenth Circuit has reached precisely the same conclusion as did the

Sixth Circuit. *MCI Telecomms. Corp.* v. *Public Serv. Comm'n of Utah*, 2000 WL 783382, at *9 (10th Cir. June 20, 2000).

The procedural history of *MCI Telecomms.* parallels this case in every pertinent respect. Competing LECs filed petitions with the Utah Public Service Commission requesting arbitration of certain open issues relating to section 252 interconnection agreements with the incumbent LEC. *MCI Telecomms. Corp.*, 2000 WL 783382, at *4. The Utah state regulators conducted the requested arbitration, "issued an arbitration order resolving a number of open issues," and "directed the parties to file fully executed interconnection agreements * * * that were consistent with the UPSC's resolution of the parties' disputes." *Id.* The Utah commissioners then "reviewed and approved the submitted interconnection agreements pursuant to 47 U.S.C.A. § 252(e)." *Id.* The incumbent LEC subsequently brought suit under section 252(e)(6), alleging that certain determinations by the state commissioners violated federal law. See *id.*; see also *id.*, at *10 (discussing but not resolving the incumbent LECs claim on the merits).

The state commissioners moved to dismiss, asserting, *inter alia*, that they are immune from suit on Eleventh Amendment grounds. *MCI Telecomms. Corp.*, 2000 WL 783382, at *4. The district court denied the motion to dismiss. *Id.* at *5.[5] The Tenth Circuit affirmed on alternative grounds. First, the court held that "Utah voluntarily waived its sovereign immunity when the UPSC, through its commissioners, arbitrated the

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[5] In this case, Ameritech sued only the Commissioners in their official capacities; Ameritech did not sue the MPSC itself. Accordingly, the Sixth Circuit did not need to address whether the MPSC consented to suit in federal court through its voluntary participation in the federal regulatory scheme.

interconnection dispute in this case." *Id.* at *8. Second, the court held that "[e]ven if the Eleventh Amendment barred U. S. West's suit against the UPSC, U. S. West still could proceed with its suit" against the commissioners in their official capacities under *Ex parte Young*. *Id.* at *9. In so doing, the Tenth Circuit expressly "adopt[ed] the Sixth Circuit's rationale and holding" that an action under section 252(e)(6) against state commissioners, in their official capacities, seeking equitable relief for ongoing violations of federal law is "'a straightforward *Ex parte Young* case.'" *Id.* (quoting *Michigan Bell Tel. Co.* v.. *Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000)). Accordingly, the only federal courts of appeals that have decided the question presented here are in full agreement with respect to the proper result and rationale.

II. THE COURT OF APPEALS' DECISION IS FULLY CONSISTENT WITH THIS COURT'S DECISION IN *SEMINOLE TRIBE*.

The principal basis on which petitioners seek this Court's review is a purported conflict between the Sixth Circuit's decision and this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). As demonstrated below, the detailed remedial scheme that strictly limits the methods of judicial redress under the Indian Gaming Regulatory Act ("IGRA") in ways that are inconsistent with the judicial remedies available under *Ex parte Young* simply has no analog under the Telecommunications Act of 1996. The 1996 Act places no limitations at all on the remedies that a federal court may use in a section 252(e)(6) suit to ensure that the obligations imposed on incumbent LECs through interconnection agreements comport with the 1996 Act. *Ex parte Young* and the Act's judicial review provisions work together to effectuate Congress' manifest intent in the 1996 Act that state officials exercising federal regulatory

power under the Act adhere to federal law. See *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

1. As this Court observed in *Seminole Tribe*, the IGRA imposes a duty on states to negotiate in good faith with Indian tribes concerning gaming on reservations, 25 U.S.C. § 2710(d)(3)(A), "in conjunction with" a very "carefully crafted and intricate remedial scheme" for limited enforcement of that duty, *id.* § 2710(d)(7). *Seminole Tribe*, 517 U.S. at 73-74. For example, although IGRA authorizes a federal court to order a state to negotiate in good faith, 25 U.S.C. § 2710(d)(7)(B)(iii), the IGRA does not permit the court to enforce its own order with contempt sanctions, as it may do in normal circumstances. Instead, if a state flouts the court's order to negotiate, the court may only refer the matter to a mediator, who will consider proposed compacts submitted by the parties and choose the one that "best embodies the terms of the Act." *Id.* § 2710(d)(7)(B)(iv); see *Seminole Tribe*, 517 U.S. at 74. And, perhaps most important, under the IGRA a state will not be subject to judicial sanctions, such as contempt, even if it refuses to honor the compact selected by the mediator. In that event, "the only sanction * * * is that the mediator shall notify the Secretary of the Interior who then must prescribe regulations" governing gaming on the tribal lands at issue. *Seminole Tribe*, 517 U.S. at 74-75.

After holding that Congress lacks authority under the Indian commerce clause to abrogate the states' Eleventh Amendment immunity, this Court turned to the Tribe's contention that jurisdiction over its suit was proper under the *Ex parte Young* doctrine. In addressing that question, the Court first expressly reaffirmed the vitality and importance of the *Ex parte Young* doctrine in "ensuring the States' compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n.14. As the Court explained, "an individual can bring suit against a state officer in

order to ensure that the officer's conduct is in compliance with federal law." *Id.* And the Court stressed that *Ex parte Young* may be used to enforce state compliance with federal law *except* in the rare case in which (i) Congress has *specifically limited* the judicial remedies available against a state or its officials *and* (ii) those statutory limitations are *inconsistent* with the judicial remedies available against state officials under *Ex parte Young*. *Id.* at 71-72 & nn.14, 16. Applying this standard to the IGRA, the Court concluded that by confining the available remedies to a "quite modest set of sanctions," Congress had "strongly indicate[d] that [it] had no wish to" permit the judicial remedies against state officials that would be available under *Ex parte Young*. *Id.* at 75-76.

Central to the *Ex parte Young* holding in *Seminole Tribe* was the recognition that Congress placed express limits on the methods of judicial redress available to courts presented with a claim that a state had failed to comply with the IGRA. For that reason, allowing a party to use the federal courts to coerce a state into compliance with the IGRA through an injunction under *Ex parte Young*, backed by the threat of contempt in the event of disobedience, would have been inconsistent with the essentially non-coercive remedial scheme in the IGRA. But where Congress has not limited the available avenues of judicial redress, the post-*Seminole Tribe* decisions in the courts of appeals consistently have recognized the continuing applicability of the *Ex parte Young* doctrine. *E.g.*, *Ellis* v. *University of Kansas Med. Ctr.*, 163 F.3d 1186, 1198 (10th Cir. 1999) (allowing suit under *Ex parte Young* to proceed because 42 U.S.C. § 1981 contains "nothing that indicates a 'detailed remedial scheme' designed to limit or prevent potential remedies within the *Seminole Tribe* meaning"); *Marie O.* v. *Edgar*, 131 F.3d 610, 616 (7th Cir. 1997) (allowing suit under *Ex parte Young* to proceed because "[i]n contrast with *Seminole*

Tribe * * * there is no explicit remedial scheme that provides only limited redress in federal court" for violation of Part H of the Individuals with Disabilities Education Act).

There is absolutely no tension, let alone inconsistency, between an *Ex parte Young* remedy and the Congressionally-prescribed remedy under the judicial review provisions in the 1996 Act. Unlike the situation in *Seminole Tribe*, permitting section 252(e)(6) suits to proceed under *Ex parte Young* would not "cast[] aside * * * limitations" that Congress intentionally created through "a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Seminole Tribe*, 517 U.S. at 74. There simply are *no* limitations in section 252(e)(6) on the remedies that a federal court may use to ensure that state officials performing federal regulatory functions under the Act comply with federal law. Section 252(e) simply instructs the federal court to review the state regulators' actions for compliance with the 1996 Act and, if those actions deviate from the Act, the court may fashion any appropriate relief needed to ensure that the officials "hew" to "the lines" drawn by the Act. *Cf. AT&T Corp.*, 525 U.S. at 378 n.6.

An *Ex parte Young* suit to ensure compliance with the 1996 Act is therefore fully consistent with the remedy that Congress prescribed. Indeed, it would be difficult to fashion a tighter fit between the remedy contemplated in the Act (a federal court order requiring that the agreement be modified to meet the requirements of the federal Act) and *Ex parte Young*'s core function of permitting "suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n.14 (citing *Ex parte*

Young, 209 U.S. 123 (1908)).[6] In short, as one district court recently noted, "the remedy provided for by statute [under the Act] and the remedy under *Young* are one and the same." *Bell Atlantic-Delaware, Inc.* v. *Global Naps South, Inc.*, 77 F. Supp. 2d 492, 501 (D. Del. 1999).

2. Having failed to come to grips with the fundamental distinction between this case and *Seminole Tribe* — that Congress placed no limits whatsoever on the methods of judicial redress in an action under section 252(e)(6) of the 1996 Act — petitioners troll at the margins of that decision, straining for a way to shoehorn this case into the *Seminole Tribe* paradigm. But petitioners' efforts are deeply flawed.

a. Petitioners first suggest that the availability of *Ex parte Young* will encourage parties to rush to federal court before the preconditions of a section 252(e)(6) action — negotiation, arbitration, and approval of a final interconnection agreement — have been completed. Pet. 9-11. This suggestion is baffling. Nothing in the Sixth Circuit's decision even remotely suggests that a party need not comply with all procedural requirements under the Act before seeking judicial review. All that the Sixth Circuit held is that *Ex parte Young* is an appropriate means of securing review of final action by state regulators approving or

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[6] The Commissioners' statement that Congress "limited review in federal court to whether the interconnection agreements comply with the requirements of the [1996 Act]" (Pet. 9) confuses the scope of federal court review with the scope of available remedies. If anything, Congress' intimation in section 252(e)(6) that federal court review is limited to issues of federal law suggests that an *Ex parte Young* remedy is precisely what Congress had in mind when it authorized federal judicial review of state commission action.

rejecting an interconnection agreement under section 252(e)(2) of the Act to ensure that those officials operate within the confines of the Act. Pet. App. 8a-9a.

The decisions that petitioners cite — "reject[ing] attempts by parties to obtain judicial review of State commission rulings during the arbitration process that did not involve or follow the approval of final agreements," Pet. 9 — are both unobjectionable and irrelevant to the *Ex parte Young* analysis. Those cases quite properly limit the timing of an action for review of state regulator determinations under section 252(e)(6); in no way do they limit the scope of available judicial remedies for final state commission determinations that do not meet the requirements of federal law. As those decisions recognize, Congress has set forth a step-by-step administrative procedure that ends with review in federal court under section 252(e)(6). No action challenging state commission determinations arbitrating, approving or rejecting an interconnection agreement can be maintained until the commission's determinations are final. And nothing in the Sixth Circuit's opinion suggests otherwise. In short, the Sixth Circuit's *Ex parte Young* ruling does not create substantive rights, expand in any way the scope of judicial review, or add to or subtract from the range of remedies available under the Act.

b. Petitioners also contend that an *Ex parte Young* action should be unavailable here because the Act only "authorizes the review of interconnection agreements," not review of the determinations that form the basis for obligations that state regulators order to be included in the agreements. Pet. 8-9. As both the Sixth and Seventh Circuits have concluded, this argument has no basis in the 1996 Act. Pet. App. 9a-10a; *Illinois Bell Tel. Co. v. Worldcom Technologies, Inc.*, 179 F.3d 566, 570-71 (7th Cir. 1999).

The text and structure of section 252 strongly support the courts of appeals' rejection of petitioners' misguided theory that Congress intended federal courts only to review disembodied "agreements." Section 252(e)(6) is entitled "Review of *State Commission Actions*," and explicitly provides that the federal courthouse door swings open only for those "aggrieved" by a state commission "determination" under section 252. In addition, section 252(e)(4) of the Act — which, as the Seventh Circuit held, must be "read in conjunction with subsection 252(e)(6)," *Illinois Bell*, 179 F.3d at 571 — provides that "[n]o State court shall have jurisdiction to review *the action of a State commission* in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4) (emphasis added). Section 252(e)(4) thus takes away from state courts what 252(e)(6) confers on federal courts — namely, the power "to review the *Action of a State commission*." And section 252(e)(1) of the Act requires "written findings," a requirement that makes sense only if the state regulators' actions will later be subject to judicial review using the agency record.

Moreover, in actions for judicial review of an agency determination, it is standard procedure for the agency or its officials to appear in federal court to defend its decision. See, *e.g.*, 5 U.S.C. § 702; Fed. R. App. P. 15. And such suits are so frequent, that Fed. R. App. P. 43 provides for automatic substitution of successor officers when officials who are parties to lawsuits leave office. When Congress provided for "[r]eview of state commission actions" in section 252(e)(6), it was legislating against the background rule that agencies or agency officials are usually parties to the judicial review of their orders. In short, Congress must be presumed to have known that the *Ex parte Young* doctrine enables the federal courts to "bring * * * to heel" recalcitrant state officials who refuse to "hew" to "the

lines" drawn by the Act and its implementing regulations. *AT&T Corp.*, 525 U.S. at 378 n.6.[7]

III. THE COURT OF APPEALS' DECISION IS FULLY CONSISTENT WITH THE *EX PARTE YOUNG* DOCTRINE.

In their final section, petitioners claim that the Sixth Circuit misapplied *Ex parte Young* in two respects. First, petitioners assert that an *Ex parte Young* action would improperly interfere

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[7] It bears mentioning that the 1996 Act also differs from the IGRA with respect to who may be sued. In *Seminole Tribe*, this Court looked to the statutory language and the duty that it imposed in concluding that the IGRA did not contemplate "both a suit against a State * * * and a suit against a state official." 517 U.S. at 75 n.17. As the Court noted, the IGRA refers repeatedly to "the State." *Id.* And "the duty imposed by the Act — to 'negotiate * * * in good faith to enter into' a compact with another sovereign — stands distinct in that it is not of the sort likely to be performed by an individual state executive officer or even a group of officers." *Id.* Neither circumstance is present here. First, the definition of "State commission" in the Act reveals that Congress did not intend to refer to the sovereign, but instead to a group of officials exercising delegated power within the state government: "The term 'State commission' means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C. § 153(41). Second, the state commission determinations that are reviewable under section 252(e)(6) are always performed by "an individual state executive officer or * * * a group of officers." *Seminole Tribe*, 517 U.S. at 75 n.17.

with the exercise of state agency discretion relating to the arbitration and approval or rejection of interconnection agreements. Pet. 12-13. Second, they suggest that this is not a proper *Ex parte Young* action because their orders have no "ongoing" effects and, at most, constitute "past violations" of federal law. Pet. 14-16. Petitioners' contentions are way off the mark. Petitioners have no discretion to violate federal law, and their orders impose forward-looking — and thus ongoing — obligations on Ameritech. The Sixth Circuit correctly held that this "is a straightforward *Ex parte Young* case." Pet. App. 8a; see also *MCI Telecomms. Corp.* v. *Public Serv. Comm'n of Utah*, 2000 WL 783382, at *9 (10th Cir. June 20, 2000) (agreeing that *Ex parte Young* applies in this scenario). It is petitioners, not the courts of appeals, that misapprehend the *Ex parte Young* doctrine.

1. Under *Ex parte Young* and its progeny, even where the state itself is immune from suit in federal court, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979). As many courts have observed, the doctrine is grounded in the Supremacy Clause and "ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). In *Ex parte Young* itself, the Court held that a state official whose conduct violates federal law may not be said to represent the state, and thus is stripped of his or her immunity, because the state is bound to follow federal law under the Supremacy Clause. 209 U.S. 123, 159-60 (1908). The doctrine thus permits federal courts to issue declaratory or injunctive relief "to end a continuing violation of federal law" by state officials and

"to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

This Court permitted actions to enjoin state officials acting in violation of federal law — which today might be called "*Ex parte Young* actions" in shorthand — long before *Ex parte Young* itself was decided. See *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299, 304-05 & n.14 (1952) (noting that the Court had "long held," prior to 1908, that injunctive actions against state officers could proceed consistent with the Eleventh Amendment and that *Ex parte Young*, merely "reexamined and reaffirmed" that principle); *Ex parte Young*, 209 U.S. at 167 (noting that "jurisdiction of this general character has * * * been exercised by Federal courts from the time of *Osborn* v. *Bank of United States*," a case decided in 1824). Indeed, federal courts have followed a longstanding practice of reviewing the actions of state public utility commissions pursuant to the rule of *Ex parte Young*. See, *e.g.*, *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341, 344 n.4 (1951). And this Court's recent decisions have reaffirmed the vitality of the *Young* doctrine.

Just last Term in *Alden* v. *Maine* the Court stated that "suits for declaratory or injunctive relief against state officers must * * * be permitted if [federal law] is to remain the supreme law of the land," and thus the *Ex parte Young* doctrine is an "essential * * * part of our sovereign immunity doctrine." 527 U.S. 706, 747-48 (1999); see also *id.* at 757.[8] Under this

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[8] And two Terms earlier, all nine Justices reaffirmed "the continuing validity of the *Ex parte Young* doctrine." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997); see also *id.* at 281 ("[a]n allegation of an on-going violation of federal law

(continued...)

Court's decisions, to determine whether jurisdiction is available under *Ex parte Young*, federal courts need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Coeur d'Alene Tribe*, 521 U.S. at 296 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment); see also *id.* at 298-99 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (endorsing the same two-part test). Ameritech's complaint easily meets this test, because it (i) alleges that the commissioners approved an interconnection agreement that imposes prospective, binding obligations on Ameritech and that those obligations are inconsistent with federal law and (ii) seeks equitable relief from those allegedly unlawful obligations. Pet. App. 8a-9a.

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[8](...continued)
where the requested relief is prospective is ordinarily sufficient to invoke [*Ex parte Young*]"); *id.* at 293 (O'Connor, J., concurring in part and concurring in the judgment) ("When a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar"); *id.* at 297 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) ("in the absence of some congressional limitation a federal court may entertain an individual's suit to enjoin a state officer from official action that violates federal law"). As Justice O'Connor stated, the *Ex parte Young* doctrine remains a "basic principle of federal law" that reflects "the importance of having federal courts open to enforce and interpret federal rights." *Id.* at 293 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment).

2. Contrary to petitioners' suggestion (Pet. 12-13), they have a duty to comply with the numerous substantive and procedural requirements imposed by federal law. Once petitioners opted to participate in the arbitration and approval process under the Act, they were duty bound to ensure that the interconnection agreement they imposed on Ameritech comported with federal law. Simply put, under the Supremacy Clause, petitioners have no discretion to violate federal law when discharging their duties under the Act.

The Commissioners rely on this Court's statement in *Ex parte Young* that the courts "cannot control the exercise of the discretion" of a state officer. Pet. at 12-13 (quoting *Ex parte Young*, 209 U.S. at 158). Later in the same decision, however, the Court expressly held that state officials' "general discretion regarding the enforcement of the laws * * * is not interfered with by an injunction which restrains the state officer from taking any steps toward the enforcement of an unconstitutional enactment, to the injury of the complainant." *Ex parte Young*, 209 U.S. at 159. As the Court explained, "[a]n injunction to prevent [a state official] from doing that which he has no legal right to do is not an interference with the discretion of an officer." *Id.*; see also *Poindexter* v. *Greenhow*, 114 U.S. 270, 290 (1885) ("the distinction between the government of a state and the state itself is important, and should be observed"); *id.* ("whatever wrong is attempted in [the] name [of the state] is imputable to its government, and not to the state, for, as [the state] can speak and act only by law, whatever it does say and do must be lawful"). Where, as here, a complaint properly alleges that state officials have committed ongoing violations of federal law, petitioners' reliance on the concept of discretion is misplaced.

3. Petitioners' suggestion that this is not a proper *Ex parte Young* action because their orders have no "ongoing"

effects and, at most, constitute "past violations" of federal law is simply wrong. Under section 252, if the parties cannot agree on what terms and conditions are required by the Act, state public utility commissioners step in as *regulators* and "impos[e] appropriate conditions as required to implement" the federal Act. 47 U.S.C. §§ 252(b)(4)(C) and 252(c)(1). The state officials then require the parties to put those obligations into an interconnection agreement prior to seeking final approval. 47 U.S.C. § 252(e)(1). In performing these functions, petitioners exercised *coercive regulatory power*, and what resulted from their exercise of that power was a carrier-specific government regulation that is legally binding on the parties unless and until it is set aside by a federal court pursuant to section 252(e)(6).

Moreover, the "ongoing" legal consequences of the Commissioners' orders are not confined to the parties to the agreement. Under section 252(i) of the Act, the terms and conditions that the Commissioners imposed on Ameritech in the Climax agreement are available to any other carrier that requests them. Under these circumstances, it is simply undeniable that the interconnection orders that Ameritech is challenging here have "ongoing" legal consequences.

Because petitioners' orders have ongoing legal effects, petitioners' contention that "there is no ongoing case" (Pet. 14) is beside the point.[9/] It is well established that an official

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[9] In any event, petitioners' suggestion that their involvement in the interconnection process ends with their approval of an interconnection agreement (Pet. 14-15) is refuted by their own actions. For example, in a January 28, 1998 decision arising out of an interconnection agreement dispute between Ameritech and several other carriers, petitioners held that (continued...)

capacity action against a state official may proceed under *Ex parte Young* even if the violation arises from past conduct, provided that the unlawful effects are ongoing and the relief sought acts prospectively. *Papasan* v. *Allain*, 478 U.S. 265, 282 (1986) (*Ex parte Young* action available to correct unlawful disparity in school funding resulting from past disposition of public lands). As the Fourth Circuit recently explained, "a future injunction is not made retrospective merely because it recognizes that an ongoing violation of law is the result of a past wrong." *CSX Transp., Inc.* v. *Board of Pub. Works*, 138 F.3d 537, 541 (4th Cir. 1998) (upholding an injunction against future collection of illegal taxes, even those that already had been assessed, as prospective relief under *Ex parte Young*). In any event, petitioners' claim that "there is no ongoing case" is suspect as a factual matter, for petitioners expressly "reserve[d] jurisdiction" to "issue further orders as necessary" in this case. Pet. App. 37a.

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[9](...continued)
Ameritech's actions violated "*the Commission's orders approving the interconnection agreements.*" *In re Brooks Fiber Communications, Inc.*, 1998 Mich. PSC LEXIS 47, at *25 (Mich. Pub. Serv. Comm'n Jan. 28, 1998) (emphasis added). Obviously Ameritech could not "violate" an order that imposes no "ongoing" obligation on it.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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No. 99-1878

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In the Supreme Court of the United States

OCTOBER TERM, 1999

JOHN G. STRAND, JOHN C. SHEA, and DAVID A. SVANDA, Commissioners of the Michigan Public Service Commission, *Petitioners*,

v.

MICHIGAN BELL TELEPHONE CO., UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, and CLIMAX TELEPHONE CO., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR MICHIGAN BELL TELEPHONE COMPANY d/b/a AMERITECH MICHIGAN IN OPPOSITION

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SUPPLEMENTAL BRIEF FOR MICHIGAN BELL TELEPHONE COMPANY d/b/a AMERITECH MICHIGAN IN OPPOSITION

Pursuant to Rule 15.8, respondent Michigan Bell Telephone Company d/b/a Ameritech Michigan ("Ameritech") respectfully draws to this Court's attention the Seventh Circuit's decision in *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 2000 WL 1010863 (7th Cir. July 24, 2000) ("*MCI*"), issued on July 24, 2000, that bears on the question presented in this case.

1. In *MCI*, the Seventh Circuit held that the carriers may proceed with their respective federal claims for equitable relief against the individual commissioners under the *Ex parte Young* doctrine." 2000 WL 1010863, at *2.[1/] In so doing, the court expressly "agree[d] with the Sixth and Tenth Circuits" that suits seeking injunctive relief from determinations made by state commissions that allegedly are contrary to the 1996 Act "are 'straightforward' *Ex parte Young* cases." *Id.* at *18. This decision preserves the unanimity in the courts of appeals on the sole question presented in the Commissioners' petition. See Ameritech Brief in Opposition ("Ameritech Br.") 8-10. For that reason alone, *MCI* provides significant additional support for Ameritech's (and the United States') contention that the petition should be denied.

2. The *MCI* decision has significance far beyond its holding, however, because the Seventh Circuit's comprehensive and well-reasoned decision expressly identified and rejected

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[1] The court also independently held that "the states have waived their Eleventh Amendment immunity by participating in the regulatory scheme created by the Act." *Id.*

many of the flawed arguments advanced by the petitioners in this case.

a. Most importantly, the Seventh Circuit squarely rejected the Illinois and Wisconsin Commissioners' argument that this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), somehow rendered the *Ex parte Young* doctrine inapplicable to cases brought under section 252(e)(6) of the 1996 Act. *MCI*, 2000 WL 1010863, at *19. In particular, the Seventh Circuit found the Commissioners' analogy to *Seminole Tribe* to be "flawed," because "[s]ection 252 of the Act does not create a 'detailed remedial scheme' that manifests Congress' intent to limit the scope of statutory remedies available to parties aggrieved by state commissioners' interconnection determinations." *Id.* As the court noted, "in stark contrast to what the Supreme Court called a 'modest set of sanctions' under the statute at issue in *Seminole Tribe*," Congress "has not limited the court's remedial power under subsection 252(e)(6) of the 1996 Telecommunications Act." *Id.* at *19-*20. This is precisely the reasoning advanced by Ameritech in its Brief in Opposition. See Ameritech Br. 10-14.[2/]

b. The Seventh Circuit also rejected the argument, advanced by the Michigan Commissioners here and by the

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[2] The Seventh Circuit also correctly noted that this Court's decisions in *Alden* v. *Maine*, 527 U.S. 706 (1999), *College Savings Bank*, v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), and *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank*, 527 U.S. 627 (1999), not only "have not called the *Ex parte Young* doctrine into question," but, in fact, have "reaffirmed the doctrine's role in the sovereign immunity context." 2000 WL 1010863, at *18.

Illinois and Wisconsin Commissioners in *MCI*, that the Act provides only for federal court review of interconnection agreements themselves, but not of state commission determinations arbitrating, approving, interpreting or enforcing those agreements. As the court held, subsections 252(e)(4) and (e)(6) of the Act, read together, show that "Congress envisioned suits reviewing 'actions' by state commissions, as opposed to reviewing only the agreements themselves, and that Congress intended that such suits be brought exclusively in federal court." *MCI*, 2000 WL 1010863, at *12; see also Ameritech Br. 15-17.

c. Finally, the Seventh Circuit explicitly rejected the argument that *Ex parte Young* does not apply because any violations of federal law that may have occurred during a state commission's deliberations over an interconnection agreement "occurred in the past." *MCI*, 2000 WL 1010863, at *18. As the court noted in words that are equally applicable here, "[t]he challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law." *Id.* A request for such relief, the court concluded, "is precisely the type contemplated by the *Ex parte Young* doctrine," and the carriers' claim thus "fit squarely within the traditional framework of *Ex parte Young*." *Id.* See also Ameritech Br. 21-23.

* * * * *

In the most comprehensive court of appeals opinion issued to date, the Seventh Circuit joined the Sixth Circuit and the Tenth Circuit in rejecting the arguments set forth in the Commissioners' petition. No circuits have reached a contrary result. Moreover, as Ameritech and the United States have demonstrated in their briefs in opposition, the unanimous views of the courts of appeals are entirely consistent with this Court's

decision in *Seminole Tribe* and with the entire body of this Court's *Ex parte Young* jurisprudence. For all of these reasons, there is no reason to grant review in this case.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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